

## ARTICLE

### BEST PRACTICES FOR AN INTERNAL WHISTLEBLOWING PLATFORM (WP)

*Valerie Junod\**

*Whistleblowing is one tool, among many others, to prevent, deter and detect violations of the law or of the firm's own ethical norms. This article presents proposals to set up an effective internal whistleblowing platform within a firm. These proposals outline the procedures that should be followed to handle whistleblowing reports. In addition, the article explains how an internal department or an externalized service should be set up to process these reports. The purpose of these proposals is to reach a satisfactory compromise between the interests of the firm in having its own values upheld, the interests of the State in securing compliance with the laws, the interests of the employees in working in an honest and safe environment, the interests of other stakeholders to be treated fairly and finally, the interests of denounced parties not to be wrongly accused.*

INTRODUCTION .....	476
I. WHO ARE THE WP BENEFICIARIES?.....	478
II. WHICH UNITS OF THE FIRM? .....	479
III. WHICH INFORMATION? .....	479
IV. WHICH STAFF? .....	480
V. WHICH LEVEL OF CONFIDENTIALITY? .....	480
VI. EVIDENTIARY BURDEN FOR WHISTLEBLOWERS? .....	481
VII. WHICH PROCEDURES? .....	481
VIII. WHICH RELATIONSHIP WITH THE AUTHORITIES? .....	482
IX. WHICH PROTECTION FOR WHISTLEBLOWERS? .....	482
X. WHICH RIGHTS FOR THE INCRIMINATED INDIVIDUALS? .....	483
XI. WHICH SANCTIONS AGAINST MALICIOUS USERS OF THE WP? .....	484
XII. WHICH STATE-PAID REWARDS FOR THE WHISTLEBLOWERS? .....	484
XIII. WHICH OTHER REWARDS FOR WHISTLEBLOWERS? .....	484
XIV. WHICH PUBLICITY? .....	485
XV. WHICH MONITORING? .....	485
XVI. WHICH REWARDS FOR THE COMPANY? .....	486

---

\* Valerie Junod, Ph.D in law and Professor, at School of Law, University of Geneva, Switzerland; Professor, at Faculty of Business and Economics, University of Lausanne, Switzerland. Contact: valerie.junod@unige.ch

XVII. WHICH CONSEQUENCES FOR COMPANY'S BREACHES?.....	486
CONCLUSION.....	487

## INTRODUCTION

Why encourage whistleblowing? The short answer is that whistleblowing<sup>1</sup> prevents, discourages and brings to light violations of legal norms or of self-imposed ethical principles. If one accepts that rules have beneficial effects on the companies they apply to as well as on society at large, deterring and correcting their breach is certainly positive.

Of course, whistleblowing is not the only way to obtain this favorable outcome. State-led investigations, compliance controls within the firm, civil enforcement by harmed private parties also have this beneficial effect. However, depending on the circumstances, only insiders (or former insiders) within the firm are aware of violations and can speak up to bring them to an end; the authorities may well be ignorant and other powerful actors within the firm may have an interest in perpetuating the violations. In such cases, the insider is in a unique position to alter the balance of powers and bring the misconduct to an end. However, speaking up might be so costly as to dissuade the would-be whistleblower. Alert services with their protective measures in favor of whistleblowers are meant to reduce these costs and risks. If whistleblowing becomes (nearly) risk-free, individuals are more likely to decide on the basis of ethical values whether they should intervene to put a stop to the violations.

Once it becomes known within a firm that many individuals are willing to speak up against legal or ethical breaches, then those who might be tempted to “cut corners” or go against the rules will show more caution and may well desist. This creates a virtuous circle where others are more likely to follow suit and imitate best practices.

For this to succeed, as mentioned above, whistleblowing should carry no (or almost no) risks for the whistleblower; otherwise all but the bravest individuals would give up and abdicate upholding prosocial values. Ultimately, the firm would suffer, because the internal climate would become increasingly unpleasant and the firm's reputation would deteriorate. Firms' whistleblowing platforms (WP) should therefore be organized to achieve this goal of risk reduction. I use the word “platform” here to refer both to an existing structure (*e.g.* a within-the-firm department or an externalized service) and to the corresponding operating procedures.

The present article proposes a framework to organize an effective WP.<sup>2</sup> Although

---

<sup>1</sup> Whistleblowing is here defined as reporting information relating to possible instances of (past, current, or future) ethical or legal breaches occurring within a firm. Whether or not the reported information was viewed as confidential by the firm is here irrelevant.

<sup>2</sup> “Effective” is meant in the sense that it will achieve the firm's purpose of preventing and uncovering violations of its own ethical norms as well as violations of (state) regulations.

there is little or no empirical evidence to back these proposals,<sup>3</sup> logical reasoning lends them strong support. The arguments in favor of and against these proposals are briefly sketched. Many of these proposals can be viewed as mainstream and are endorsed by international guidelines;<sup>4</sup> others are more innovative and may encounter less adherence. The scope of this article is limited to internal whistleblowing and focuses on its practical implementation.<sup>5</sup> It does not address the divisive issue of when reports to the state

---

<sup>3</sup> There is considerable literature on the subject of whistleblowing. Both legal scholars and scientists from other disciplines have studied the field. Many empirical studies have identified the profile of typical whistleblowers; others have inquired how they lived their “whistleblowing experience.” See e.g. A. S. Kesselheim, D. M. Studdert & M. M. Mello, *Whistle-Blowers’ Experiences in Fraud Litigation against Pharmaceutical Companies*, 362 *New England Journal of Medicine*, 1832–1839 (2010). A few empirical studies have considered the firm environment most conducive to individual’s decisions to blow the whistle. See e.g. D. L. Seifert, J. T. Joireman & J. M. Thornton, *The Influence of Organizational Justice on Accountant Whistleblowing*, 35 *Accounting, Organizations and Society*, 707–717 (2010), and the cited literature. Vandekerckhove and Lewis et al have compared how whistleblowing has been implemented in four key guidelines. See W. Vandekerckhove & D. Lewis, *The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines*, 108 *Journal of Business Ethics*, 253–264 (2012). A study by S. Wolfe et al has ranked the G20 countries according to how their respective laws handle various aspects of whistleblowing. See S. Wolfe, M. Worth & S. Dreyfus et al, *Whistleblower Protection Laws in G20 Countries, Priorities for Action*, available at <https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf> (last visited Sep. in 2014). In addition, accounting firms like PricewaterhouseCoopers or Ernst & Young regularly conduct surveys of large firms to describe how whistleblowing is internally organized. See also Middlesex University, *A Survey of Whistleblowing/ Confidential Reporting Procedures in the UK Top 250 FTSE Firms*, SAI Global Research Report (2010). However, at least to my knowledge, there have not been any empirical tests to ascertain how whistleblowing should be organized to secure greatest efficiency both from the perspective of the firm and from the more global perspective of society. Designing such experience would undoubtedly be challenging. However, with more and more countries introducing mandatory whistleblowing within firms, natural field experiments (e.g. with historical control) will become feasible.

<sup>4</sup> Several international bodies have adopted position papers on how to implement both internal and external whistleblowing. See e.g. Organization of American States (OAS), *Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses*, (2001); Article 29 Data Protection Working Party, Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime (2006); International Chamber of Commerce (ICC), *Guidelines on Whistleblowing* (2008); British Standards Institution (BSi) & Public concern at work, *Whistleblowing Arrangements Code of Practice*, Publicly available specification (2008); Council of Europe, Parliamentary Assembly, *Resolution 1729 on the Protection of Whistleblowers*, (2010); G20 Compendium of best practices and guiding principles for legislation on the protection of whistleblowers, annex to the G20 Anti-corruption action plan on the protection of whistleblowers (2010); CleanGovBiz-Integrity in practice, *Whistleblower Protection: Encouraging Reporting*, (2012); European Commission, *Guidelines on Whistleblowing*, Securities Exchange Commission (SEC), (2012) 679 final (2012); Government Accountability Project (GAP), *International Best Practices for Whistleblower Policies*, (2013); Transparency International, *International Principles for Whistleblower Legislation*, (2013); European Ombudsman, *Draft Decision on Internal Rules concerning Whistleblowing*, (2014).

<sup>5</sup> On the choice between internal or external whistleblowing, see e.g. T. M. Dworkin & M. S. Baucus, *Internal vs External Whistleblowing: A comparison of Whistleblowing Processes*, 17 *Journal of Business Ethics*, 1281–1298 (1998).

authorities, trade unions or to the media are permissible.<sup>6</sup> Additionally, only private sector whistleblowing is contemplated.

### I. WHO ARE THE WP BENEFICIARIES?

Ideally, a WP should be available to a wide circle of “beneficiaries” (by this term, I mean parties entitled to refer concerns to the WP).<sup>7</sup> Current employees are typical beneficiaries. However, the spectrum should be broader. This is because, as mentioned in the introduction, the purpose of a WP is to assist the firm in defending its values and objectives. Restricting eligibility would automatically lower the number of irregularities brought to light.

Therefore, eligible parties should also encompass former employees, current and former consultants, contractors, suppliers, clients. High-level executives of the firm must also be able to refer their concerns to the WP. To put it simply, except for individuals bound by the attorney-client privilege, there should not be any outright restrictions as to whom can apply to the WP.<sup>8</sup> Depending on the industry, even members of the public or NGOs may hold valuable information about ethical lapses or legal breaches. However, the procedure, including the rights and obligations on each side, may be different depending on who blows the whistle. For example, a client complaining of a faulty product may well be oriented to a different department.

A WP will only be used if their “beneficiaries” know it exists. The natural and legal persons who can avail themselves of the WP should receive information about its existence, its benefits, and its procedures. Tools to convey such information include codes of conduct, employee manuals, posters, leaflets, web pages, references in agreements with third-parties. These documents should underscore the objectives ascribed to whistleblowing by the firm and the “services” offered by the WP.

Furthermore, the firm should identify groups particularly likely to know of (legal or ethical) irregularities and train their members. Training should encompass how to actually make use of the WP. Outreach efforts should extend beyond the scope of current

---

<sup>6</sup> See however the interesting compromise reached under the Final rule under Section 922 of the Dodd-Frank Act. External whistleblowing (*i.e.* to the authorities) is financially rewarded, but internal whistleblowing (*i.e.* within the firm) is nonetheless encouraged. For example, the government’s financial reward can be set at a higher level when internal pathways for whistleblowing were first used.

<sup>7</sup> I do not support mandatory whistleblowing, *i.e.* a duty for ordinary employees to report concerns. Except for certain executives hired to assume compliance tasks, the “ordinary” employee lacks expertise, training and confidence to recognize situations of mandatory reporting. Arguing convincingly against such a duty, see W. Vanderkerckhove & E. E. Tsahuridu, *Risky Rescues and the Duty to Blow the Whistle*, 97 *Journal of Business Ethics*, 365–380 (2010).

<sup>8</sup> The Dodd-Frank Act (Section 922) and the corresponding SEC Final Regulation 21F (effective Aug. 12, 2011) implemented an interesting compromise as to groups (partially) excluded from whistleblowing privilege and rewards. For an overview of the SEC Final Rules, see PricewaterhouseCoopers (PWC), *The Dodd-Frank Wall Street Reform and Consumer Protection Act, A Closer Look* (Jul. 2011).

employees. Trade unions, when they exist, may be of assistance to emphasize the firm's and social values, chiefly integrity and openness.

## II. WHICH UNITS OF THE FIRM?

Multinationals may want to organize several distinct platforms, according to national or regional boundaries. However, there should be a mechanism to exchange information between these platforms. The situation where one WP retains information of potential use to another platform or unit should be avoided. Best practices should be gathered in a bottom-up approach and then exchanged throughout the network.

In many cases, having an external WP may prove advantageous. A WP handling many contacts, incidents and inquiries will gain greater experience than one which is only called to intervene infrequently. Trust in an external platform may well be greater. Costs may even be lower when they can be shared among several firms (*e.g.* cost of staffing a 24/7 telephone & email hotline).

## III. WHICH INFORMATION?

The scope of irregularities that can be the subject of an alarm should be broad. It is difficult and indeed counter-productive to distinguish between criminal, administrative, civil and ethical breaches. Similarly, whistleblowing should not be limited to serious breaches. Individuals benefitting from the platform usually lack the legal skills to put the proper label on the type of misconduct. A wide net is more likely to reveal information. Situations that only involve two individuals — for example two colleagues or one subordinate and the hierarchical superior — may be of less public interest and relevance to the functioning of the firm. However, the victim is not always in a position to determine whether the violation affects only his or her own situation or is prevalent across larger groups of individuals (*e.g.* sexual harassment on a broader scale). By encompassing more “personal” irregularities, the WP is better able to understand the functioning of the firm.<sup>9</sup> Once again, depending on the content of the report, the incident may be handled differently or by a different service.<sup>10</sup> The WP should have formal operating procedures to spell out how information arising out of tips will be processed and then archived (*e.g.* a fraud response plan if fraud is alleged).

---

<sup>9</sup> Irregularities that only engage the relationship between two individuals (*i.e.* without any impact on the firm or other stakeholders) are generally best handled by another department.

<sup>10</sup> A fear often expressed is that whistleblowing is being abused to air personal grievances among colleagues or against hierarchical superiors. The WP ends up stuck with heaps of reports that should best be addressed by the HR department or simply by managers. However, such a problem is more likely to arise when HR departments and managers are unsuccessful or unwilling to assume their mission of mediating interpersonal disputes. The solution is therefore to improve all departments in charge of handling internal clashes.

#### IV. WHICH STAFF?

The WP's staff should be separate from the compliance or the legal department — or else it implies that those departments are exempt from violations and immune to whistleblowing. Personnel should comprise individuals with a variety of backgrounds. There should at least be a person with legal skills and another with psychosocial skills (each possibly working part-time depending on the workload). Resources to hire adjunct staffs, such as investigators or accountants, should be available on a case-by-case basis. For example, when tax irregularities are alleged, a tax expert may be needed. Of course, the size of the staff is to be tailored based on the size and on the activities of the firm; small firms may not even be able to afford one full-time employee. In such a case, sharing a WP among several firms is an adequate solution.

The hierarchical position of the WP director should be sufficiently high to be in direct contact with the firm's chief executive officer, its audit committee and/or its board of directors. Similarly, when the WP is external, it should have direct access to the firm's top-level executives.

WP staff should be rotated every few years. When an individual joins an internal WP, his or her employment contract should guarantee him or her a given position when tenure with the WP ends. As is the case already today with external accountants, rotation ensures that WP members retain the necessary independence and objectivity to uphold both the legitimate interests of whistleblowers and those of the firm. For similar reasons, the WP should enjoy a budget set for a given number of years (*e.g.* 5 years), so as to avoid threats of budgetary cuts should the firm's leaders be displeased with the way the WP operates.

#### V. WHICH LEVEL OF CONFIDENTIALITY?

There should be two channels by which alerts are received: A purely anonymous route, for example via an email service set up in such manner, and a confidential service where the identity of the whistleblower is known by the WP, but protected against disclosure to others.

The anonymous route is sometimes criticized because the WP staff is unable to request clarifications of an initial alert, for example when the latter is vague or incomplete. Moreover, the potential for abuse is greater in case of an anonymous service, since malevolent individuals who falsely denounce others have nothing to fear. Alerts received through the anonymous route will usually be given less credit. However, important information may still be received through such a channel, especially in social or regional contexts where individuals are especially fearful of retaliation.

The confidential channel must guarantee that the identity of the whistleblower will not be revealed to staff outside the WP, except in the rarest of circumstances or if the whistleblower gives his or her consent. These exceptional circumstances should be publicly listed so that whistleblowers can weigh the risk. One key exception is when the

denunciation was clearly made in bad faith.

## VI. EVIDENTIARY BURDEN FOR WHISTLEBLOWERS?

As long as they act in good faith, whistleblowers should not have to prove nor have to bring forward evidence supporting their alert. It is wiser to accept even vague suspicions rather than to discourage individuals with potentially helpful information. Worse, when would-be whistleblowers are told that they must bring proof, they may feel the need to conduct their own investigations, which may put them, the firm or the target of their suspicions in danger or in a disreputable position.

Therefore, it is up to units with investigative capabilities within the firm (*e.g.* compliance, accounting or legal departments) to explore the information and evidence brought forward by whistleblowers via the WP. These departments have the necessary resources to do it well, within a reasonably short timeframe, and without unduly disrupting regular firm activities.

## VII. WHICH PROCEDURES?

Whistleblowers should be able to direct any queries to the WP and obtain rapid and accurate answers in reply. Reports show that whistleblowers are often unsure of what they can or should report and what consequences this may have on their position within the firm.<sup>11</sup> Often they would like to be guided so as to do “the right thing.” They seek acceptance and endorsement from others for what they believe is proper conduct on their part. The WP has an important role to play to offer such guidance and to reassure whistleblowers that their action is indeed commended.

This guidance can be effected in an informal manner though telephone (*e.g.* 24/7 hotlines), email or in-person discussion. Information and advice may be given at several points in time. For example, during a first telephone conversation, the WP counselor may outline what the firm is interested in learning and why, what evidence will be sought, how the process will play out, what are the risks and benefits for the firm and the individual; questions from the whistleblowers will be either answered on the spot or deferred for further analysis and subsequent reply. At the end, the individual should know what to expect so as to reevaluate his or her plan to blow the whistle. As much as possible, one staff counselor should be assigned to each whistleblower throughout the procedure; this maintains trust and avoids painful duplication of disclosure, which would be likely to occur if several different individuals were to process in turn the reports.

Whistleblowers have legitimate expectations to be informed of the outcomes of their alerts. Being kept in the dark about the firm-led investigations and its results is

---

<sup>11</sup> See *e.g.* House of Commons, Committee of Public Accounts, *Whistleblowing*, Ninth Report of Session 2014–15 (2014); US Merit Systems Protection Board, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, A Report to the President and the Congress of the US, (2011).



demoralizing. Hence, the WP should keep updated whistleblowers who have expressed such a wish. Nonetheless, whistleblowers are not entitled to participate directly as investigators in the inquiry.

### VIII. WHICH RELATIONSHIP WITH THE AUTHORITIES?

It should be recognized that the WP has the right to forward substantial evidence of criminal or administrative violations to the national public authorities. Of course, a company may wish to keep incriminating evidence secret to avoid sanctions. However, having the WP staff bound by secrecy even in case of clear legal breaches puts them in an untenable position. Employees of the WP are to defend the integrity of the firm and its stakeholders; they cannot become accomplices in violations, even if those are past violations.

Exceptions may be tolerated when the violation is minor (*e.g.* traffic violations), when it can no longer be prosecuted (*e.g.* barred by statute of limitations), or when all adverse consequences have been corrected (*e.g.* due payments were made). However, the decision to apply an exception should be made jointly by the WP director, on one hand, and by the chief executive officer or the board of directors, on the other hand.

### IX. WHICH PROTECTION FOR WHISTLEBLOWERS?

Depending on their status, whistleblowers run different kinds of risks.<sup>12</sup> Current employees fear for their position and their advancement within the company. Suppliers are afraid to see their contracts cancelled, not renewed or altered for the worse. Customers may get worse deals. Individuals who no longer have an ongoing relationship with the company (*e.g.* past employees or past suppliers) may fear to be blacklisted when the company has enough clout with other persons to tarnish the reputation of the whistleblower. Some whistleblowers may fear the publicity and the diversion of time and energy that involvement in a procedure may entail.

If such concerns are not addressed, the message implicitly sent is that the firm does not welcome whistleblowing. Such a harsh message is usually heard — and “obeyed” — by the vast majority of stakeholders.

Therefore, one of the key tasks of the WP should be to attend to these concerns. Preoccupations and doubts should be discussed upfront. To a certain extent, an arrangement should be reached between the whistleblowers and the WP. For example,

---

<sup>12</sup> Certain individuals may have been personally involved in the fraud and may fear punishment for their own actions. This gives rise to a dilemma because the interest of the firm in learning of the violation conflicts with its interest to punish the wrongdoers. However, if the whistleblower is to expect punishment, he or she may prefer not to come forward and to either stay silent or pursue the irregular actions. A similar situation has been recognized in antitrust law, where leniency is offered to cartel members who denounce other members of the cartel (*i.e.* the other parties to the anticompetitive agreement). It is therefore recognized that the interest in bringing the cartel to an end exceeds the interest to punish all its participants.



certain whistleblowers may wish to be moved to a different firm unit or to a different service; some may ask to take early paid retirement. Solutions should be negotiated directly between the WP and the (prospective) whistleblower and be made binding on the firm. Of course, the agreed-upon solution may be made conditionally upon certain fact findings (*e.g.* the evidence submitted is authentic). This proposal is admittedly provocative as firm leaders may oppose the idea of WP's commitments made binding upon the firm. Nonetheless, past history reveals that retaliation remains all too common.<sup>13</sup>

More generally, firm's guidelines should be explicit in that no retaliatory measures against (good faith) whistleblowers will be tolerated.<sup>14</sup> Protection extends to the earlier refusal of the subsequent whistleblower to take part in the misconduct. Guidelines should illustrate what will be viewed as retaliation (*e.g.* discrimination in promotion). They should warn those who nonetheless engage in reprisal that they will be sanctioned.<sup>15</sup> These guidelines should be publicly accessible. The tone set at the very top of the firm should clearly be that whistleblowing is part of a constructive and valued dialogue between the firm's stakeholders and its decision-makers.

#### X. WHICH RIGHTS FOR THE INCRIMINATED INDIVIDUALS?

The individuals and groups accused by the whistleblowers must be guaranteed fair treatment during the investigation. They have a right to be heard and to comment on all available evidence. They have the right of assistance of counsel. Their procedural rights may however be curtailed in that they may not be told the identity of their accuser. This is nonetheless justified as the protection of the whistleblower's identity rates higher than the right to know the origin of the accusation.

Incriminated individuals must have reasonable expectations of the sanctions they incur should they be found responsible of the breaches at issue. The firm should spell out the range of internal penalties; termination of the contract relationship should be the rule when the breach is serious and willful.

When the firm's investigation reaches the conclusion that no breach was committed, the (wrongly) accused party is entitled to full protection against reprisal measures. In that respect, its status should be equivalent to that of the good faith whistleblower.

---

<sup>13</sup> See *e.g.* K. J. Lennane, "Whistleblowing": A Health Issue, 307 *British Medical Journal*, 667 (1993); R. Rhodes & J. J. Strain, *Whistleblowing in Academic Medicine*, 30 *Journal of Medical Ethics*, 35–39 (2004); K. Patrick, *Barriers to Whistleblowing in the NHS*, 345 *British Medical Journal*, e6840 (2012).

<sup>14</sup> Although this is beyond the scope of this article, penal codes criminalizing the disclosure of firm's confidential information by employees and other similarly-placed individuals should be amended. This offense should be restricted to situations where disclosure is made to firm's competitors or when disclosure is meant to inflict competitive harm upon the firm. Disclosure to WP or to the authorities should not be criminalized.

<sup>15</sup> In the US, those who retaliate against whistleblowers even face criminal sanctions. See Section 1107 of the Sarbanes-Oxley Act of 2002, Public Law 107–204.

### **XI. WHICH SANCTIONS AGAINST MALICIOUS USERS OF THE WP?**

Whistleblowers may not know for sure whether the facts they have observed are constitutive of a legal or ethical violation. They may be uncertain about what qualifies as a violation. However, the system can only work if reports are made in good faith. As long as the tip is provided in good faith, it is up to the WP to clarify and investigate the fact and possibly the law.

On the other hand, reports made in bad faith, with malicious intent, or of spurious content, threaten to damage the concept of whistleblowing — a tool meant to safeguard the legitimate interests of the firm and of society. Hence, individuals or entities who clearly acted with malicious intent or in disregard of the truth should be punished.<sup>16</sup> Sanctions will be disciplinary (*e.g.* dismissal) when the whistleblower is a current employee. For external parties, there should be legal sanctions, akin to those for false accusations made to courts or state agencies.

### **XII. WHICH STATE-PAID REWARDS FOR THE WHISTLEBLOWERS?**

Rewarding financially whistleblowers is highly controversial. The US is among the rare countries where the government generously compensates the whistleblowers. Depending on the type of violations, they are granted up to 30% of the fine paid by the company that they denounced.<sup>17</sup> These strong incentives have proved very effective, all the more since US penalties can reach colossal amounts. However, it may lead to counter-productive behavior when individuals refrain from speaking up internally in order to touch the “jackpot” through a public inquiry.

The WP will find it more difficult to do its job well if the whistleblowers prefer to avoid its “service” in order to contact the national authorities directly. If one believes that the WP has a significant role to play to develop a culture of integrity and openness, side-stepping the WP is an undesirable outcome.

### **XIII. WHICH OTHER REWARDS FOR WHISTLEBLOWERS?**

The risk/benefit ratio looks very different when rewards originate from the company. WP should be given a budget to reward particularly deserving whistleblowers. Clearly, the WP should be able to justify how it is using its funds. It should also be given the opportunity to ask for complementary amounts to increase the rewards when necessary. Non-cash rewards should also be available (*e.g.* public recognition, promotion or better contracting deals). Although most whistleblowers will not be moved to action just because of the money, they may nonetheless

---

<sup>16</sup> If bad faith should be punished, a purely altruistic intent should not be a requirement to use a WP.

<sup>17</sup> In the US, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission, the Internal Revenue Service and the Department of Justice (in relation with the US False Claims Act) all offer rewards to certain whistleblowers.

appreciate receiving a token of gratitude. If this gift — financial or not — stems from the WP, as opposed to the firm, its size will be perceived in a more neutral fashion; in other words, whistleblowers are less likely to expect an internal reward calculated based on the revenues or profits of the firm.

Aside from financial rewards, the firm should have other mechanisms to express its gratitude to its whistleblowers. The message that whistleblowing is essential to safeguard the values of the firm should come from the very top of the firm's hierarchy. Executives and board members should regularly highlight the importance of integrity and insist on the key role of whistleblowers to deter and detect dishonest practices.

#### **XIV. WHICH PUBLICITY?**

Many aspects of the work of the WP should be transparent. First, the rules governing the functioning of the WP should be public and easily accessible (*i.e.* not just on an intranet). Second, the platform should publish a yearly report indicating how many alerts it received, from which kind of sources (*e.g.* 10% from former employees, 80% from current employees, 10% from suppliers). The report should describe how these alerts were investigated and which were the outcomes (*e.g.* 3 serious violations, 1 minor violation, 10 cases where the suspicions proved unfounded). The number of staff hours expended should be stated. The role of external experts hired during the year should be described. This report should be public.<sup>18</sup>

Why such transparency? Whistleblowing is meant to inhibit deviations from the firm's objectives of full compliance with its obligations and internal values. The WP is meant as a tool to promote (ethical) integrity and (legal) compliance. This tool must not only work — but also be shown to work. If people can observe that whistleblowing works and is welcomed “in real life,” they will be incentivized to uphold the firms' standards, and their own high ethical values. WP transparency serves to promote a culture of honesty.

In addition, transparent reporting lets everyone learn from the successes and failures of the WP. Best practices will be recognized earlier if the necessary data to make an assessment are available.

#### **XV. WHICH MONITORING?**

As for any other important firm functions, the WP's operations should regularly be evaluated. Deficiencies and potential for improvements should be identified. Metrics (key performance indicators) to evaluate the effectiveness of the WP should be agreed in advance. Whenever possible, whistleblowers should be surveyed to assess their

---

<sup>18</sup> An example of thorough reporting is that of the US Dodd-Frank whistleblowing program: annual reports inform the public as to the performance, strengths and weaknesses of the program.

experience with the WP. The corresponding appraisal should be made public.<sup>19</sup>

### **XVI. WHICH REWARDS FOR THE COMPANY?**

To a certain extent firms that implement a well-functioning WP should be rewarded. Investing the time and resources in making such platform work should not lead to worse treatment by the authorities or worse legal penalties.

Which rewards can be contemplated?

First, the documents held by the WP should be privileged so that public authorities should not be allowed to compel production against the will of the WP.<sup>20</sup> Second, whenever the company self-reports previously unknown violations identified through the WP, the fines and sanctions decided by the public authority should be significantly reduced. Of course, corrective measures can still be imposed in situations where the company did not fully cure the violation. Profits achieved only because of the violation should also be disgorged. On the other hand, punitive damages should be shunned when the WP functions as it should.

Companies could also be encouraged by other means, such as ostensible preference awarded in public procurement procedures. Private or public labels could recognize companies which have created an open internal climate for raising legal or ethical concerns. WP should be included in the firm's annual social responsibility report.

### **XVII. WHICH CONSEQUENCES FOR COMPANY'S BREACHES?**

When the WP fails to perform as it is supposed to, whistleblowers, firm's stakeholders and society are likely to suffer adverse consequences.

Whistleblowers which experience retaliatory measures from the company should be allowed to raise a claim for full indemnification, while benefitting from a lowered burden of proof. It would be enough for the whistleblower to prove that, absent the whistleblowing act, he or she would likely have achieved a pecuniary gain (*e.g.* wages from continued employment, profits from a renewed supplier contract). In other words, the whistleblower would not need to prove with certainty the causal links between the whistleblowing and the reprisal and between the latter and the financial loss; a reasonable likelihood would shift the burden of proof onto the company; it would then be for the company to establish that it would have, in any case, put an end to the relationship with the whistleblower for totally unrelated reasons (*e.g.* economic difficulties, discontinuance of a product line).

To protect other stakeholders and the society at large, violations of the WP's operating procedures should carry administrative sanctions. For example, failure to treat whistleblower's information confidentially would be punished by a fine calculated as a

---

<sup>19</sup> A model of thorough evaluation is provided by the US Office of Inspector General's audit of the SEC's whistleblower program published in 2013.

<sup>20</sup> On the other hand, the WP may sometimes wish to collaborate with the national authorities and voluntarily release documents.

(small) percentage of the company's profits.

### **CONCLUSION**

Opponents of whistleblowing often show exaggerated fears that this practice will turn every firm employee into a spy acting for and paid by the government, a spy intent on harming the firm's business and reputation. Whistleblowing is seen as value-destroying. Hence, it should be discouraged or, at any rate, kept in close check.

In my view, if whistleblowing is correctly handled, it can be the opposite. It will turn firm stakeholders into its ears and eyes, making sure that the firm's values are upheld and protected by everyone interacting with the firm. It will prevent government inquiries. It may even promote less government intervention in favor of corporate self-regulation. Ultimately, firms are ideally positioned to define, delimit, balance and police their commitments to integrity and financial prosperity. By articulating the criteria for an effective WP, the present contribution should initiate debate regarding whistleblowing's optimization.