Establishing and implementing whistleblowing policies and procedures

**MCCG Practice 3.2**
The board establishes, reviews and together with management implements policies and procedures on whistleblowing.

**MCCG Intended Outcome 3.0**
The board is committed to promoting good business conduct and maintaining a healthy corporate culture that engenders integrity, transparency and fairness.

The board, management, employees and other stakeholders are clear on what is considered acceptable behaviour and practice in the company.

The internalisation and application of the content “Why” and “How” should be read in tandem with the line of sight outlined by the Intended Outcome.

**Why**
The case for change

Corporate crimes including fraud and corruption are one of the main obstacles to sustainable socioeconomic development for emerging and developed economies alike. Weaknesses in averting such crimes would undermine governance, leading to knock-on effects which include distortion of market mechanisms like fair competition, diminution of domestic and foreign investments as well as loss of future business opportunities for stakeholders.

Estimates show that the worldwide cost of corruption equals to more than 5% of global Gross Domestic Product with over US$1 trillion paid in bribes each year¹. The prevalence of such incidences and the profound impact that stems from them highlight the importance of building a corporate culture that supports the giving and receiving of “bad news”, i.e. creating a candid environment of openness and honesty and the presentation of unfavourable information.

In the absence of a well-designed internal complaint framework for employees to raise concerns about illegal or unethical activity that they are aware of through their work (or better known as whistleblowing policy and procedures), companies risk falling into a vicious cycle, as illustrated on the following page.

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¹ *Integrity in Practice 2014, Organisation for Economic Co-operation and Development*
Over the years, whistleblowing has proven to be the most prevalent detection technique to uncover white collar crimes in corporations. In many instances, employees accounted for most of the whistleblowing tips that led to the discovery of fraud.

In KPMG’s forensic survey titled “Global Profiles of the Fraudster 2016”, it was found that 44% of fraudsters were detected as a result of a tip, complaint and formal whistleblowing reports either via hotline or other than formal hotline channels.

The observation that whistleblowing is a major line of defence against fraud and corruption was corroborated by numerous other research studies including the Global Fraud Study (2016) by Association of Certified Fraud Examiners, as illustrated below:
**The practice in substance**

As stated in Guidance to Practice 3.2 of MCCG, the board should encourage employees to report genuine concerns in relation to breach of a legal obligation (including negligence, criminal activity, breach of contract and breach of law), miscarriage of justice, danger to health and safety or to the environment and the cover-up of any of these in the workplace.

As with the MCCG, Bank Negara Malaysia’s Policy Document on Corporate Governance recognises that whistleblowing can serve as an important tool in preventing misconducts at the “get-go” stage. Standard 18.2 of the said document has impressed upon the need for financial institutions to establish a whistleblowing policy, accompanied with relevant procedures and avenues for legitimate concerns to be objectively investigated and addressed. The provision further states that individuals must be able to raise concerns about illegal, unethical or questionable practices in confidence and without the risk of reprisal.

Regulatory requirements have also placed a positive obligation on selected gatekeepers (e.g. external auditors and audit committees) to whistleblow given their position of power and nexus to confidential proceedings. In such instances, the failure to whistleblow by these gatekeepers would constitute an offence.

The Capital Market and Services Act 2007 enumerates provisions concerning obligation of external auditors to whistleblow on matters under their purview.

**Section 320(1) of Capital Market and Services Act 2007 (“CMSA”)**

If an auditor, in the course of the performance of his duties as an auditor of a listed corporation, is of the professional opinion that there has been a breach or non-performance of any requirement or provision of the securities laws, a breach of any of the rules of the stock exchange or any matter which may adversely affect to a material extent the financial position of the listed corporation, the auditor shall immediately submit a written report on the matter –

(a) in the case of a breach or non-performance of any requirement or provision of the securities laws, to the Commission;

(b) in the case of a breach or non-performance of any of the rules of a stock exchange, to the relevant stock exchange and the Commission; or

(c) in any other case which adversely affects to a material extent the financial position of the listed corporation, to the relevant stock exchange and the Commission.

**Inaction as an offence**

As with gatekeepers such as external auditors and audit committee, any individual to whom any gratification is given, promised or offered is obligated to whistleblow.

**Section 25(1) of Malaysian Anti-Corruption Commission Act 2009** states that, “any person to whom any gratification is given, promised or offered, in contravention of any provision of this Act shall report such gift, promise or offer together with the name, if known, of the person who gave, promised or offered such gratification to him to the nearest officer of the Commission or police officer”.

Any person who fails to comply with the aforementioned provision is deemed to have committed an offence.
The obligation of an audit committee is meanwhile outlined in **Bursa Securities Listing Requirements**.

**Paragraph 15.16 of Bursa Securities Listing Requirements**

**Reporting of breaches to the Exchange**

Where an audit committee is of the view that a matter reported by it to the board of directors of a listed issuer has not been satisfactorily resolved resulting in a breach of these Requirements, the audit committee must promptly report such matter to the Exchange.

Key considerations relating to the application of this Practice are discussed below:

**What are the common barriers faced by companies in implementing whistleblowing policy and procedures and how can they be managed?**

Factors that commonly pose a challenge in operationalising whistleblowing as well as the pertinent steps that can be taken to manage such challenges are outlined below:

<table>
<thead>
<tr>
<th>Operational barrier</th>
<th>Emotional barrier</th>
<th>Cultural barrier</th>
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<td>The whistleblowing process is not fully embedded throughout the company and reporting lines are not operating effectively with lack of communication to all employees on available avenues.</td>
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<td>Whistleblowers are commonly deterred from reporting incidents to management due to reasons such as fear of trouble and potential dismissal.</td>
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<td>Whistleblowers are commonly viewed with a negative connotation such as “source of friction”. This perception can make it difficult to blow the whistle although individuals recognise that it is good for the company and other stakeholders.</td>
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<td>In this regard, the board must ensure that there is a clear channel of communication between the board and the employees and employees must be well-informed on the whistleblowing policy as well as the relevant procedures including the avenues available for them to whistleblow.</td>
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<td>In accordance with the regulatory provisions in <strong>Companies Act 2016</strong> and <strong>CMSA²</strong>, the board must ensure that employees are not discriminated against their lawful employment or livelihood as a result of whistleblowing on non-observance of regulations. Further provisions on the protection of whistleblowers are outlined in <strong>Whistleblowers Protection Act 2010</strong> (covered in the ensuing pages of this write-up).</td>
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<td>Whistleblowers are commonly viewed with a negative connotation such as “source of friction”. This perception can make it difficult to blow the whistle although individuals recognise that it is good for the company and other stakeholders.</td>
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<td>To this end, the board should set the tone by communicating that every employee has a role to play in detecting, preventing and correcting misconducts and that whistleblowing is an important means for that purpose. Moral support should also be provided to whistleblowers (e.g. demonstration of appreciation as opposed to outright skepticism and disbelief of the complaints or concerns received from the whistleblower).</td>
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What are the key considerations that the board should take into account when assessing whether the whistleblowing policies and procedures in place are effective and adequate?

In assessing the adequacy and effectiveness of the whistleblowing policies and procedures, the board must first undertake an assessment of the existing internal control measures that have been established by the company. This will allow the board to evaluate if the framework in place is effective and adequate to identify and combat illegal, unethical or questionable practices within the company. Some of the key considerations in relation to the assessment are as follows:

- How does the company identify illegal, unethical or questionable practices?
- What form of risk management programme does the company have in relation to the said practices?
- What is being done within the company to better prevent the said practices or at least discover it sooner?
- What processes are in place to investigate the said practices and take corrective action?

What are the elements that should be considered in developing and reviewing the whistleblowing policy and procedures?

The board or the board committee charged with the responsibility of overseeing integrity matters should consider the following:

- Are whistleblowing procedures documented and communicated throughout the company?
- Does the whistleblowing policy make clear that it is both safe and acceptable for employees to raise concerns about wrongdoing?
- Were the whistleblowing procedures arrived at through a consultative process? Do management and employees “buy into” the process?
- Are concerns raised by employees (and others) responded to within a reasonable timeframe?
- Are procedures in place to ensure that all reasonable steps are taken to prevent the victimisation of whistleblowers?
- Are there procedures to ensure that all reasonable steps are taken to keep the identity of whistleblowers confidential?
- Has a senior person been identified to whom confidential concerns can be disclosed? Does this person have the authority and determination to act if concerns are not raised with, or properly dealt with, by line management and other responsible individuals?
- Are success stories on whistleblowing publicised and made known?
- Does management understand how to act if a concern is raised? Do they understand that employees (and others) have the right to blow the whistle?

A sample whistleblowing policy is outlined in Appendix I of this Pull-out.

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2 Audit Committee Handbook 2017, KPMG
Who should be the recipients of whistleblowing reports?

The whistleblowing report should be addressed to an independent individual in the company who is not subject to undue influence or pressure by management. Individuals who may be considered appropriate ("designated parties") include:

- member of the audit committee (overall oversight);
- senior independent director (usually for complaints relating to directors and other senior management positions);
- head of internal audit department;
- head of a dedicated department that handles investigations of misconduct or any other related matters and has a direct reporting line to independent directors; and
- designated person of an independent advice centre (i.e. an independent entity that provides consultancy services which is tailored to the company’s requirements. This method is commonly deployed by multinational companies).

Where the whistleblowing report involves a breach of statutory provisions, an official report should also be made to the relevant regulatory authorities, upon consultation with the designated parties within the company.

What is the nature of protection accorded to whistleblowers?

The mere existence of a whistleblowing policy, although crucial, cannot operate in isolation. As commonly cited, “a whistleblowing policy without protection mechanisms is a paradox”. A survey conducted by the Organisation for Economic Co-operation and Development in 2015 showed that 85% of the global companies surveyed have mechanisms in place to report suspected serious corporate misconduct, but over one-third of these either did not have a written policy of protecting whistleblowers from reprisals or did not know if such a policy existed. It is therefore incumbent on the board to provide employees with effective protection.

A company must therefore ensure that there are mechanisms in place to accord whistleblowers with anonymity and access to management and selected representatives of the board, if needed. The company should also express zero tolerance for retaliation and if such acts were committed, they should be punishable.

It is also important to note that protection can extend beyond that provided by companies. In Malaysia, under the Whistleblower Protection Act 2010, a whistleblower who makes a disclosure in good faith to an enforcement agency is accorded with certain protection subject to the provisions of the said Act as follows:

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3 Committing to Effective Whistleblower Protection 2016, Organisation for Economic Co-operation and Development
4 Revocation of whistleblower protection is set out in Section 11 of Whistleblower Protection Act 2010. Circumstances which would result in a revocation of whistleblower protection, amongst others, include frivolous and vexatious whistleblowing disclosures.
5 Defined in accordance with Section 2 of Whistleblower Protection Act 2010. “enforcement agency” means, amongst others, any ministry, department, agency or other body set up by the Federal Government, State Government or local government; or a body established by a Federal law or State law, which is conferred with investigation and enforcement functions.
Protection of confidential information [Section 7(1)(a) of Whistleblower Protection Act 2010];

Immunity from civil and criminal action [Section 7(1)(b) of Whistleblower Protection Act 2010]; and

Protection from detrimental action [Section 7(1)(c) of Whistleblower Protection Act 2010];

and for the purpose of Section 7(1)(c), the protection shall be extended to any person related to or associated with the whistleblower.

Regional/International perspectives

Similar to the case of Malaysia, enumerations for companies to establish whistleblowing policy and procedures are codified across the globe.

For example, United Kingdom and Singapore have placed the responsibility on the audit committee to review and ensure that whistleblowing arrangements are in place for appropriate follow-up actions.

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<tr>
<th>Country</th>
<th>Provision(s)</th>
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<tr>
<td>United Kingdom</td>
<td>The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee’s objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action (Provision C.3.5).</td>
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<tr>
<td>Singapore</td>
<td>The audit committee should review the policy and arrangements by which staff of the company and any other persons may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee’s objective should be to ensure that arrangements are in place for such concerns to be raised and independently investigated, and for appropriate follow-up action to be taken. The existence of a whistleblowing policy should be disclosed in the company’s Annual Report, and procedures for raising such concerns should be publicly disclosed as appropriate (Guideline 12.7).</td>
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