

Hear That Lonesome Whistle Blow: Effective Techniques for Responding to Whistleblowers

SPEAKERS

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Recent whistleblower court decisions have added additional risk and complexity for companies. A US Supreme Court ruling in February narrowed the protections for whistleblowers under the Dodd-Frank Act, limiting the safeguards from being fired, demoted, or harassed only to individuals who report legal violations they've witnessed to the SEC. With whistleblowers therefore more likely to report directly to the SEC, companies may find it harder to handle allegations of wrongdoing internally. Proactive companies will apply strategies to get out in front of these issues and diffuse them early while avoiding common roadblocks and learning from the miscues of others.

A recent RANE webinar, presented in partnership with Fried Frank, brought together a panel of leading experts to explore this topic from multiple perspectives and provide pragmatic insights for companies and their boards of directors. Highlights of the discussion follow:

FIRST STEPS IN LAUNCHING AN INVESTIGATION

- All the panelists concurred that understanding the nature and severity of the complaint — whether it is a dispute between employees or an issue that could lead to serious legal exposure and reputational harm — is the first step in initiating an investigation once a whistleblower complaint has come in. This information will go a long way toward deciding whether or not to involve outside counsel.
- **Larry Gerschwer** of **Fried Frank** emphasized that companies should begin thinking about involving outside counsel when the whistleblower complaint relates to more serious legal matters, such as internal controls, fraud or bribery. In these situations, which often end up drawing the interest of regulators, “from the very beginning you want to have the independence of having someone from outside the chain of command, perhaps someone who has a reputation and relationship with the regulators.”
- If outside counsel is brought in, **Gerschwer** added, then the next critical decision that must be made is who exactly the client is — and that depends largely on the focus of the inquiry. When the alleged bad behavior is isolated to a particular group of employees or a geographic region and not linked to the C-suite, there may well be no problem with the General Counsel and other senior management being involved. But, in instances where the upper echelons of executive leadership are implicated, it may be advisable

for counsel to report to “the board of directors or an audit committee or maybe a special litigation committee comprised of independent directors to whom the investigation answers” in order to maintain credibility.

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WHO SHOULD OWN THE INTERNAL INVESTIGATION

- When a whistleblower complaint comes through an organization’s hotline, the team behind that reporting system should be responsible for the investigation and resolution, **Penman** maintained. Typically, that is the Ethics and Compliance Team; though they may not always be the ones conducting the investigation. “In the end, the employee population will hold the compliance team as the ‘owner’ of the helpline or hotline accountable for the way [the investigation is] handled.”
- That rule should apply even if the complaint relates to an interpersonal issue typically overseen by human resources, as 70 percent of all reports that come through an organization’s reporting hotline do, according to benchmarking data from NAVEX.
- **Penman** advises organizations to have a written triage process that makes clear who the complaint will be assigned to, how the complaint will be managed, what information will be reported back to the chief compliance officer and what information will be reported back to the person who raised the issue in the first place.
- In addition, she recommends having a formal escalation policy that addresses the type of illicit activity that warrant notification of the board of directors, and the timeframe in which they should be alerted. **Penman** advises that the board be notified in 24-48 hours of issues involving a senior executive of the organization, accounting or other types of internal control issues. Waiting an extra day or two could be very costly, especially if a board member ends up finding out via social media or other means before he or she is informed through official channels.

HOW TO ENCOURAGE REPORTING AND REMOVE THE WHISTLEBLOWER STIGMA

- **Serina Vash** of **RANE** explained that research shows there are two main reasons that so many employees have traditionally been reluctant to speak up about ethical lapses or corporate misconduct: fear and futility — fear that they will suffer retaliation as a result, and skepticism that “speaking up will make any kind of a difference or bear any positive outcome.”
- Yet **Pamela Verick** of **Protiviti Forensic** believes this mindset is really starting to change. “We are in the midst of a cultural revolution,” she noted. “Workers really do want to raise their hand.” Sending the message that whistleblowers will no longer be “targets of a hunt” encourages employees to speak up about potential risks that threaten their own colleagues or the viability of an organization and could cost that organization money, assets, resources, and reputation.
- **Verick** argued that organization-wide education is at the core of defusing the stigma of whistleblowers. Combining employee training and communication from upper and middle management, while reinforcing the message in town halls, encourages employees to act as good stewards of an organization and see it as their duty to speak up.

- When conducting an investigation, it is important to be clear that the compliance team, internal or outside counsel is not trying to “ferret out, let alone discredit the whistleblower, that the allegations are being taken seriously and that the investigation will not be turned on the person who brought the issue to bear,” **Gerschwer** pointed out.
- The language a company uses internally to encourage employees to speak up about bad behavior makes a real difference, according to Penman. The word “whistleblower” has negative connotations, and regardless of whether it is still used formally by regulators, organizations and compliance practitioners should be using more neutral terms, such as the term “reporter” instead. “If the hotline is called 1-800-RAT-FINK, that’s going to have a different connotation than helpline or integrity line,” she counseled.

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THE STATE OF WHISTLEBLOWER PROTECTIONS

- Many organizations are updating and strengthening their anti-retaliation policies and procedures with a zero-tolerance approach to reprisal, and further, educating their workforce on the expectations for treatment of whistleblowers and the handling of matters by those who receive complaints, **Verick** noted. That extends to protocols for investigations, so that people who make the decision to come forward with information are “treated in a consistent and respectful manner.”
- Such developments may also help to lessen the impact of a key Supreme Court ruling from earlier this year (*Digital Realty Trust v. Somers*), which held that the Dodd-Frank anti-retaliation protections (against being fired, demoted, etc.) only cover whistleblowers that report their concerns directly to the SEC. Many observers believe that this will make it more difficult for companies to get employees to raise issues internally, as Vash noted, but **Verick** argued that one way to prevent that outcome is to “encourage people to raise their hand early on before the issue or behavior in question becomes a potential violation of corporate policy or the law.” In addition, she stated, using risk assessments, employee surveys and other feedback mechanisms to start the conversation early can help companies learn about problems before an employee has to make a difficult choice about how to make a formal report.
- Complaints are increasingly being reported on job-related sites like Glassdoor as well as social media, and both **Verick** and **Penman** stressed that organizations need to be tracking and responsive to such new reporting mechanisms. If an organization dismisses or fails to monitor relevant social media for complaints it becomes a missed opportunity to address an issue before it turns into a much bigger problem. “I’ve actually come across organizations who have said, ‘If it didn’t come directly to us through our hotline, we don’t consider it a formal complaint,’” **Penman** recounted. “That’s a big mistake.”
- Some recent court cases have found that certain confidentiality and severance agreements can “possibly chill the ability of individuals to speak with regulators,” as **Gerschwer** put it, and such agreements can hurt your standing with regulators. As a result, organizations should make sure to draft any such agreements very carefully, and in general to not be “unnecessarily handcuffing people or making people feel blocked either by policy, procedure or agreement, what I call the paper wall,” **Verick** cautioned.
- Because of the legal issues around such agreements, **Gerschwer** suggests one modification to the standard Upjohn warning delivered before interviews of employees:

When investigators state that they represent the firm and not the employee, and that it is a privileged conversation, they should also make clear that while they do not want the employee to discuss the interview with anyone else, the employee is able and should feel free to share the facts discussed with government regulators.

- In trying to encourage whistleblowers to come forward, companies need to make sure they don't overcompensate by forgetting that the accused party also needs to be "treated with the same level of respect," as **Penman** stressed.

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DEALING (OR NOT) WITH REGULATORS

- The initial decision of whether or not to notify regulators of potential wrongdoing (or "self-report") is not just critical, but also "very thorny," as **Vash** stressed. There may, of course, be relatively minor matters that can be remedied internally. Yet "if it's sufficiently serious, a company could find themselves on the other end of an action, and they will have wanted to make regulators and the Department of Justice aware for the purposes of getting cooperation credit.
- In evaluating allegations of misconduct, the investigators will decide if the actions rise to the level of where a regulator needs to be involved. One factor that typically should not tilt that decision one way or another is who in the company is alleged to have committed the wrongdoing, whether rank-and-file employees or senior leaders. "Legally, you're almost always on the hook," **Gerschwer** remarked. "It is very difficult under US law to have conduct that was committed by an employee in the course of carrying out their duties that can't be attributed to the organization itself."
- Even in certain cases where an organization concludes that the issue doesn't reach that threshold, there may still be "things you have to do to sort of insulate the company against if there's further issues," **Gerschwer** said. This can include ring-fencing assets in question, thorough remediation, and expanding the investigation beyond the immediate focus in order to ensure a bigger or more systemic problem isn't overlooked. Some kind of remediation may be advisable even if a company is about to speak to regulators, as it can be helpful in showing that you are already taking the matter seriously.
- When engaging relevant regulators, companies want to stress a few things from the outset:
 - How they have already been working to guarantee the independence and integrity of the investigation.
 - How and what they have discovered so far.
 - What steps, if any, the organization has already taken to help remedy the problem.
- At the same time, according to Gerschwer, the company's general or outside counsel may want to ask regulators for clarity as to which individuals they can still speak with, which helps drive home the point that the organization is fully open to collaborating with the government.
- Organizations should also be cognizant that when sharing information with a regulator, there needs to be a balance between non-privileged facts that they are happy for the regulators to have (and which help to demonstrate their faithful reporting of the facts) and privileged conversations or information of which they do not want to waive privilege.

WHISTLEBLOWERS ABROAD

- With the advent of the General Data Protection Regulation (GDPR) in Europe, it is critical for companies to understand the regulatory standards governing what kind of information from employees they can gather, particularly in the course of investigations. Verick said hotline providers are working with their clients to help meet new requirements like what information they are taking in, and where the data is stored, and some firms are already issuing or revising their policies and procedures governing information collection and sharing.
- **Verick** also noted that she herself has seen substantial increases in hotline use and reporting from countries like China, Brazil and Russia, which typically do not have a strong track record or tradition of reporting workplace abuse or misconduct. Still, in developing markets like these, it's even more important for multinationals to implement a strong program of education and training around the value of speaking up about wrongdoing.

THE STATE, AND VALUE, OF WHISTLEBLOWER PROGRAMS

- Near the end of the discussion, Penman summarized some key findings from NAVEX's annual benchmarking data:
 - Overall, the total number of complaints organizations are receiving is growing, to the point that now about 1.4 out of every 100 employees makes some kind of report via a hotline or directly with the ethics and compliance team.
 - About 56 percent of all tips received were anonymous, but that is down from 65 percent a few years ago. "That's very positive for the maturity level of ethics and compliance programs that more employees are willing to provide their name," Penman said.
 - Close to half of all reports end up being substantiated in whole or part, a figure that should help to sway any leaders who are skeptical or hesitant about implementing a hotline. As Penman noted, "This shows that it is providing tremendous value, in that organizations are getting high-quality, actionable information."
 - Only one-half a percent of all reports concern retaliation for speaking up in the first place. That may be seen a positive indicator, but as Penman pointed out, when you consider that roughly half of all complaints to the EEOC are about some form of retaliation, the conclusion to draw is quite different. "Unfortunately organizations are not getting too many opportunities to address retaliation," she lamented. "I like to say we don't get a second chance to make a first impression. If somebody believes that they have received retaliation, then they are not likely to come back to us with that information."
- "The real benefit of such a program, in a particular case, is being able to get out in front on the facts, being about to be involved from the beginning, and prevent a situation where regulators and possibly prosecutors have had their views hardened without being able to get the perspective from the company through counsel," **Gerschwer** concluded.
- **Verick** said over the long-term the ability to track and monitor the types of issues that come through the hotline and other reporting mechanisms could give business valuable insight into areas they need to focus on and address. In the short-term, she stated, "the value is really the ability for people to understand that if they don't feel comfortable going to their supervisor up the chain of command, there is a ready mechanism for people to voice their concerns."

ABOUT THE SPEAKERS

Lawrence Gerschwer, Partner, White Collar Defense, Regulatory Enforcement and Investigations, Fried Frank

Lawrence Gerschwer's practice focuses primarily on white collar criminal and regulatory matters, including government investigations of securities and commodities fraud as well as fraud in government. Currently Gerschwer represents a number of clients in pending matters related to alleged manipulation of various benchmarks – including Libor, ISDAfix and FX rates. In addition, he has defended numerous clients facing investigations and enforcement actions conducted by the Department of Justice, the US Securities and Exchange Commission, the US Commodity Futures Trading Commission, the Internal Revenue Service and banking regulators, including federal and state criminal investigations, and related civil litigation. Gerschwer previously served as an Assistant United States Attorney for the Southern District of New York for almost nine years, where he was a member of the Securities and Commodities Fraud Unit and the Public Corruption Unit.

Carrie Penman, Chief Compliance Officer, Senior Vice President, Advisory Services, NAVEX Global

Since joining NAVEX Global, Carrie Penman has conducted numerous program, risk and culture assessment projects globally for its customers and regularly works with and trains Boards of Directors and executive teams. She also serves as a corporate monitor and independent consultant for companies with government agreements. As Chief Compliance Officer, Penman oversees NAVEX Global's internal ethics and compliance activities employing many of the best practices that we recommend to our customers. Prior to NAVEX, Penman served four years as deputy director of the Ethics and Compliance Officer Association (ECO). She was one of the earliest ethics officers in America, and developed and directed the first corporate-wide global ethics program at Westinghouse Electric Corporation. In 2017, Penman received the Ethics & Compliance Initiative (ECI) Carol R. Marshall Award for Innovation in Corporate Ethics for an extensive career contributing to the advancement of the ethics and compliance field worldwide. During which she developed the EDNY's current cross-border cybercrime practice and supervised all of the Office's cyber-related investigations and prosecutions.

Pamela Verick, Director, Protiviti Forensic

Pamela ("Pam") Verick, CFE and CCEP, focuses on investigations and anti-corruption compliance solutions and leads Protiviti's fraud risk management initiative. Verick has over 24 years of risk management experience, including creation of fraud governance systems and fraud risk management programs, planning and execution of fraud risk assessments, and conducting investigations to address fraud, misconduct and potential violations of the Foreign Corrupt Practices Act as well as equivalent anti-bribery laws and regulations. She also assists with compliance and ethics programs for both the public and private sector, and has served as a member of the Fraud Risk Management Task Force responsible for the development of COSO / ACFE Fraud Risk Management Guide.

Serina Vash, Executive Director, Governance, Risk, + Compliance, and General Counsel, RANE

Serina Vash joined RANE in September 2017 as the Executive Director of GRC and the firm's General Counsel. Prior to joining RANE, Vash was the first Executive Director of NYU School of Law's Program on Corporate Compliance and Enforcement. Hired by NYU in 2014, Vash developed the fledgling program into a leading law and policy program, dedicated to developing a richer and deeper understanding of the causes of corporate misconduct and the nature of effective enforcement and compliance. Before joining NYU, Vash served for 12 years in the United States Attorney's Office for the District of New Jersey. While at the USAO, Vash was named the first-ever Chief of the Office's General Crimes Unit. She also served as Acting Deputy Chief of the Criminal Division, Senior Litigation Counsel in both the Organized Crime/Gang Unit and the National Security Unit, and a member of the Office's Trial Mentorship Program.

ABOUT FRIED FRANK

Fried, Frank, Harris, Shriver & Jacobson LLP advises the world's leading corporations and financial institutions on their most critical legal needs and business opportunities. The Firm's approximately 450 lawyers are based in North America and Europe. More information can be found at www.friedfrank.com.

ABOUT RANE

RANE (Risk Assistance Network + Exchange) is an information and advisory services company that connects business leaders to critical risk insights and expertise, enabling risk and security professionals to more efficiently address their most pressing challenges and drive better risk management outcomes. RANE clients receive access to a global network of credentialed risk experts, curated network intelligence, risk news monitoring, in-house analysts and subject matter experts, and collaborative knowledge-sharing events.