



CORPORATE WAVELENGTH
The Corporate Governance, Risk, and Compliance Web Series

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Whistleblower Policies for the Multinational Corporation

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Haydee Olinger
 Vice President & Global Compliance Officer
 McDonald's Corporation

Daniel Reinberg
 Partner
 Foley & Lardner LLP

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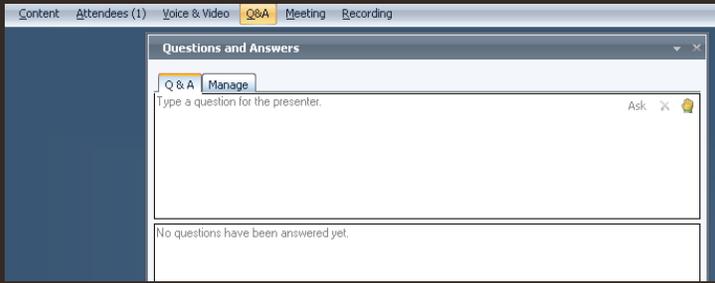
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Today's Speakers

Haydee Olinger
 Vice President & Global Compliance Officer,
 McDonald's Corporation

- Responsible for overseeing McDonald's global compliance and privacy efforts
- Enhanced McDonald's compliance efforts worldwide by creating policies to institutionalize and encourage appropriate behavior
- 24 year career at McDonald's including former positions as Home Office Director in the International Legal Department and Division General Counsel



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Today's Speakers

Daniel Reinberg
 Partner, Foley & Lardner LLP

- Part of the White Collar Defense & Corporate Compliance, Health care and Life Sciences Industry Teams
- Represents entities in lawsuits involving securities fraud, False Claims Act and Foreign Corrupt Practices Act
- Former assistant U.S. Attorney investigating and prosecuting federal crimes



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Today's Moderator

Brendan Sheehan
Executive Editor, *Corporate Secretary*



- Editorial mission: To provide innovative and insightful analysis for corporate secretaries, general counsel and compliance officers
- *Corporate Secretary* is the leading source of information on matters relating to the SEC, Sarbanes-Oxley, D&O insurance, shareholder communications, proxy solicitation and voting, director education and compensation, listing requirements and entity management

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What We Will Cover

- Statutory Protections For Whistleblowers
 - Sarbanes-Oxley Act of 2002
 - False Claims Act
 - Other Statutes
- Components of a Successful Whistleblower Policy
- International Implementation Issues
 - Conflict between Sarbanes-Oxley and EU Data Protection Laws
- Avoiding Whistleblower and Retaliation Claims



Sarbanes-Oxley Act of 2002

- Section 301 of SOX requires the Audit Committee of publicly-listed companies to establish procedures (i.e., hotlines) for the “confidential anonymous submission by employees of concerns regarding questionable accounting or auditing matters.”
- Section 806 of SOX (18 U.S.C. § 1514A) protects whistleblowers from retaliation in the form of demotion, suspension, threats, harassment, or other discrimination in the terms or conditions of employment.



Section 806 of SOX - Covered Conduct

- Protects employees of publicly-traded companies who report conduct which they reasonably believe constitutes “fraud against shareholders,” including accounting violations, violations of SEC rules and violations of the federal mail, wire, bank and securities fraud statutes.
- Whistleblowers are protected for complaints made to individuals with supervisory authority over the employee or who have the authority to investigate, discover or terminate the alleged misconduct, including the Audit Committee.

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Section 806 of SOX - Covered Conduct

- Whistleblowers are also protected for complaints made to government authorities including a federal regulatory agency, a federal law enforcement agency, or a member of any committee of Congress.
- Employees who testify or participate in proceedings addressing fraud against shareholders are also protected whether or not they “reasonably believe” that the alleged wrongdoing has occurred.

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Section 806 of SOX – Remedies

- Civil damages: Whistleblowers who can establish retaliation can obtain reinstatement, back pay with interest, special damages including litigation costs, reasonable attorney’s fees, and “all relief necessary to make the employee whole.”
- Criminal penalties: Discrimination against whistleblowers is a criminal offense if the whistleblower made a report to law enforcement. See 18 U.S.C. § 1513.



Section 806 of SOX – Administrative Procedure

- Whistleblower claims are administered by the Occupational Safety & Health Administration of the Department of Labor.
- Retaliation complaints must be filed with DOL within 90 days of an alleged violation.
- Whistleblower is required to make prima facie showing that his or her protected conduct was a contributing factor in the adverse employment decision before DOL will investigate.
- Once prima facie showing made, DOL can still refuse to investigate if the employer can demonstrate by clear and convincing evidence that it would have taken adverse employment action despite the employee engaging in protected conduct.



Section 806 of SOX – Administrative Procedure

- If DOL investigates and finds the employee has been subjected to retaliation, DOL must order the employer to immediately reinstate the employee. Either side can appeal the findings.
- Complaints can be filed in U.S. District Court if no final decision within 180 days (and there is no showing that the delay was due to the bad faith of the whistleblower).
- Whistleblowers are entitled to a trial de novo in district court, meaning that prior DOL findings will not limit or bind the court.



False Claims Act

- The False Claims Act (31 U.S.C. § 3729 et seq.) was enacted to combat fraud by U.S. government contractors
- Companies and individuals can be held liable under the FCA if they knowingly:
 - Submit or cause to be submitted a false or fraudulent claim to the U.S. government;
 - Make use, or cause to be used a false record or statement to obtain payment from the U.S. government; or
 - Conspire to defraud the U.S. Government by getting a false claim paid



False Claims Act

- Liability under FCA includes penalties of up to \$11,000 per claim plus treble damages.
- FCA allows individuals, known as relators, to file qui tam or whistleblower lawsuits to recover moneys on behalf of the U.S. government.
- Whistleblowers generally are entitled to keep between 15% and 35% of the funds recovered on behalf of the government

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False Claims Act

- Section 3730(h) of the FCA provides protection for whistleblowers:
“Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions or his or her employment by his or her employer because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.”

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False Claims Act

- This protection extends to whistleblowers even if they have not yet filed a FCA lawsuit
- Liability can attach for retaliation even if the underlying FCA allegations are not proven true
- Statute of limitations is generally 6 years from the date of the alleged violation, though it is shorter in California and a few other jurisdictions.

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False Claims Act

- To prevail, whistleblower must show (1) they engaged in protected conduct under the FCA; (2) the employer had notice of the protected conduct; and (3) the adverse employment decision was made in retaliation for the protected conduct.
- A prevailing whistleblower can obtain reinstatement, double back pay, interest, special damages including attorneys fees and costs, and any other remedy to make the employee whole.

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Other Protection for Whistleblowers

- There are over 50 federal whistleblower protection laws. A list of these laws can be found at www.whistleblowerlaws.com/statutes.htm.
- There are also many similar state and local laws
- Many of these laws do not permit whistleblowers to file lawsuits directly in court, but instead provide for administrative proceedings
- Many have statute of limitations that are very short, some as short as 30 days from the alleged retaliation.

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Components of a Successful Whistleblower Program

- Whistleblower program should be a part of a larger system-wide compliance and ethics program.
- Corporate values and culture that supports ethical behavior
- Establish “tone at the top”
- Code of Conduct
- Mandate employee training
- Policies Non-retaliation
 - Conflicts of interest
 - Ethics
- Employee Communication

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Components of a Successful Whistleblower Program

- Implementation of a 24/7/365 hotline that allows for anonymous submissions
 - Additional communications vehicles such as e-mail, P.O. Box, direct line.
 - Encourage requests for guidance and ethical dilemma advice
- Protect confidentiality of caller
 - Use a third party provider
 - If not practical:
 - Do not use caller id, e-mail tracking or other means of tracking caller identity.

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Components of a Successful Whistleblower Program

- Establish investigation protocols
- Follow through with reports of misconduct and establish effective internal controls to prevent further similar offenses.
- Implement effective disciplinary measures
- Reward ethical behavior
 - Incorporate behaviors into performance reviews

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International Implementation Issues

- Conflict between SOX § 301 requirements for an anonymous reporting system and European Union Data Protection Laws
- Representative European Privacy Rulings
 - May 26, 2005 decision of the French data protection authority (“CNIL”) refusing to allow McDonald’s France and an affiliate of Exide Technologies to operate anonymous reporting systems.
 - June 2005 decision of a local German labor court refusing to allow Wal-Mart to implement part of its company code of conduct that invited employees to report misconduct by means of a hotline.

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International Implementation Issues

- November 2005 Guidance by CNIL that a whistleblower policy can be implemented if it meets requirements including, but not limited to:
 - The policy must encourage non-anonymous reporting
 - The policy is limited to financial wrongdoing
 - The identity of the whistleblower is kept confidential
 - An accused person should be informed of the whistleblower report as soon as it is received, but only after steps have been taken to protect the evidence.
 - Certain communication and processing requirements are met.

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International Implementation Issues

- Strategies for International Implementation
 - Involve international management
 - Communicate whistleblowing policies and procedures in writing in multiple languages and with a clear articulation of what constitutes wrong doing
 - Tailor the message to the culture
 - Consult with local counsel
 - Facilitate reporting by creating a safe environment in which to do so
 - Provide local or regional resources
 - Frequently review and evaluate the effectiveness of the whistleblowing policies and procedures

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Avoiding Whistleblower and Retaliation Claims

- Create a robust compliance program that creates an environment where employees will come forward with concerns about wrongdoing internally before they become disgruntled former employees
 - Establish and update a complaint and investigation protocol
 - Establish and update a code of conduct and policies regarding ethics and conflicts of interest and non-retaliation
 - Train all employees regarding complaint procedure and non-retaliation policy
- Follow through on all complaints raised by whistleblowers and, if possible, communicate back to the complainant that this has been done

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Avoiding Whistleblower and Retaliation Claims

- Conduct exit interviews with all separating employees and specifically ask if they are aware of any instances of wrongdoing
- Consider severance agreements with releases of whistleblower claims
 - Not always enforceable
 - U.S. ex rel. Whitten v. Triad Hospitals, 2005 WL 3741538 (S.D. Ga. 2005) held that, where government refused to intervene in a FCA lawsuit, release in severance agreement barred the relator from maintaining the whistleblower lawsuit
 - Need to be careful that release is narrowly drawn and does not preclude the employee from participating in a government maintained lawsuit or investigation.



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Avoiding Whistleblower and Retaliation Claims

- Include “compliance representations” in severance agreements requiring the employee to specifically list all known compliance issues and emphasizing that these representations are material consideration for the payments made under the severance agreement

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Thank you for your participation

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Haydee Olinger
 (haydee.olinger@us.mcd.com)

Daniel Reinberg
 (dreinberg@foley.com)

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