Recurrent Themes & Common Drivers of Whistleblows

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This guide identifies various recurrent themes and common drivers which underlie many whistleblowing incidents within the financial services sector. Alongside, it offers some practical insights and observations, together with a selection of thought-provoking questions—with the overarching objective of helping organisations prevent underlying circumstances which commonly serve as whistleblow catalysts.

See Sample Questionnaire – Whistleblower Policy Evaluation.

Backdrop

Many sectors, including financial services, have encountered a discernible increase in whistleblows in recent times—a trend that shows no signs of abating. Some whistleblowers have seen fit to publicise their concerns in the press and/or share them with their firm's regulator—often due to a frustration that their issues have not been addressed satisfactorily—or at all—when first raised internally.

For some, this trend is attributable, in significant part, to the prevalence of movements such as #MeToo and BLM, which, coupled with a strong regulatory focus on the cultural importance of "speak-up," has resulted in a generally greater sense of emboldenment and propensity within the workforce to report concerns.

For the purposes of this guide, the term "whistleblow" should be interpreted as concern held by any person in relation to the activities of a firm, including breaches of rules, violations of the firm's policies and procedures, and any behaviour that harms or is likely to harm the reputation or financial well-being of the firm.

Initial Observations

Interconnectivity

Given that there is significant interconnectivity and a degree of overlap between the themes and drivers outlined below, they should be read and addressed collectively.

Perceptual Awareness

Several of the drivers highlighted involve actual or perceived issues—indeed, perceived issues account for a significant proportion of whistleblows. It is vital to pay meaningful heed to the manner in which situations may be perceived by others.

Realistically, this will only occur if organisations and their senior management teams possess the requisite levels of perceptual awareness, together with an inherent resolve to apply a perception lens to a given situation or decision, as appropriate. Proactive contemplation of how situations are, or might be, perceived from an employee and, where relevant, an external perspective should help promote awareness.

Communication, Transparency & Visible Demonstration

In addition to perceptual awareness, adverse perceptions can also be prevented or mitigated through clear and thoughtful communication, transparency, and visible demonstration. These themes feature prominently below.

Common Underlying Themes & Drivers

The following themes and drivers are drawn from Latham's experience in undertaking, and advising in relation to, a substantial number of whistleblow investigations.

Actual or Perceived Impropriety

Actual or perceived impropriety accounts for arguably the greatest number of whistleblows. Organisations will routinely implement systems and controls, policies, and procedures—a key function of which is to help reduce the risk of impropriety, for instance, legal, regulatory, or ethical violations.

Situations can commonly develop in which a perception or suspicion of the existence of impropriety is formed by those in proximity to the relevant conduct or incident. A recent real-life example concerned a perceived "unhealthily" close working relationship—i.e., not arm's length—between certain senior employees and external consultants or suppliers, with whom they dealt regularly, resulting in a suspicion that decisions—e.g., the awarding of contracts—were not necessarily being made in the best interests of the firm, or worse, were being made unlawfully.

Of course, not all such perceptions will have foundation. The vast majority of whistleblows are, in Latham's experience, made in good faith. However, it is inevitable that some will amount to unfortunate misinterpretations of situations. In some cases, for example, the whistleblower may have interpreted a situation in an adverse manner, without knowing certain salient facts or being aware of crucial contextual backdrop. Here, the whistleblower is unknowingly acting upon a materially incomplete picture.

Misperceptions can arise, most obviously, from one or both of a lack of perceptual awareness—as to how one's words or actions might be construed by others—and poor or weak communication or transparency.

Accordingly, in respect of perceived impropriety, the importance of combining pervasive perceptual awareness at both institutional and individual levels and consistently clear communication and transparency cannot be overstated. While these measures are clearly not a panacea—some observers will "get the wrong end of the stick" regardless—together, they will likely serve as the most effective and obvious forms of mitigating control in this context.

Latham has observed an increasing trend towards high-quality and impactful behavioural skills training—especially at managerial levels. Such training will commonly cover, amongst other areas, self-awareness, self-reflection, perceptual awareness, and demonstrable empathy.

Firms might prudently and regularly review their communications and transparency policies and practices to ensure that they consistently disseminate clear and comprehensible information. At a minimum, firms should avoid leaving any obvious questions "begging," conveying confusing messages, or using ambiguous terms or language which are open to interpretation.

Actual or Perceived Unfairness, Inequality or Inconsistency

The vast majority of organisations espouse corporate values, with which they and their employees are expected to continually adhere. Invariably, such corporate values will include, amongst others, a commitment to fairness, equality, and consistency. Preferential, unfair, unequal, or inconsistent treatment represents one of the most common whistleblow drivers.

A frequent complaint in this context relates to perceived differential treatment of senior versus junior personnel—flowing from incidents or breaches with which both levels of personnel were involved. A perception that a more senior person has, unjustifiably, been treated more leniently compared with a junior colleague—e.g., a junior colleague has been "scapegoated"—in relation to the same or a substantively similar incident is a common whistleblow catalyst.

Perceived unfair, unequal, or inconsistent treatment has also proved to be a key driver of unethical conduct. When an individual feels unfairly treated, they are arguably more inclined to commit ethical transgressions.

Regulators will often take a particular interest in the fairness of treatment between senior and junior ranks. Indeed, any suggestion that a senior employee has, by virtue of their seniority, received unduly favourable treatment will likely be viewed as a cultural "red flag"—not least since such an outcome offends against the general regulatory principle that commensurately higher conduct standards are expected of more senior personnel, and is seemingly irreconcilable with espoused corporate values.

Any organisation proposing to impose a lower sanction on a more senior employee compared with a junior colleague for an identical or ostensibly similar transgression would therefore be well-advised to ensure that it has a cogent and credible justification in case this stance is ever challenged.

Failure to Listen to Concerns Raised Informally

Most organisations today will actively promote and pursue a "speak-up" or "psychologically safe" culture whereby employees are encouraged to raise concerns, self-identify errors, and make constructive challenges, without fear of adverse consequences. Regulators continue to emphasise the paramount importance of such a culture and will likely take a dim view of any indications to the contrary. However—and self-evidently—"speaking up" will prove futile unless the organisation actually listens and responds appropriately.

Many whistleblows will have been regarded by their instigator as a last-resort option: the whistleblower having raised their concern(s) informally, albeit to no avail. The whistleblower sees no other alternative but to pursue a formal—and, increasingly of late, public—route to voice their concern(s). By way of example, in the US, the Securities and Exchange Commission (SEC) operates a whistleblower awards program that permits awards of between 10% and 30% of monetary sanctions collected as a result of a whistleblower report. In its 2021 Annual Report, the SEC's Office of the Whistleblower reported that of the award recipients who were company insiders, 75% first raised their concerns to supervisors, compliance personnel, or through internal reporting channels—or understood their supervisor or compliance personnel already knew of the violations.

ESG or sustainability-related concerns offer a topical illustrative case. In recent months, numerous ESG whistleblow cases have been the subject of high-profile media coverage—in each case, with the whistleblower having first raised their concerns informally. ESG can be an especially emotive topic—thus potentially heightening the propensity of whistleblowers to "go formal and/or public" when their informal representations have seemingly been ignored.

Similarly, and more generally, a perceived failure to respond to, and act upon, negative employee engagement survey findings has also proved to be an underlying whistleblow driver. Organisations that utilise such surveys or similar feedback mechanisms—the vast majority in the current environment—must act and, crucially, be seen to act on relevant findings, however inconvenient they may be. A failure to do so can be construed as an unwillingness by the firm to confront "bad" feedback and, worse, an indicator of a "tick box" culture—see further below.

Latham has observed numerous situations in which a lack of action or even acknowledgement in response to informal concerns is attributable to the recipient either not having appreciated their potential significance or having effectively dismissed the expressed concerns as "noise" or trivial "grumblings." Either way, the concerns are taken no further and therefore not acted upon.

In other cases, where actions have been instigated in response to the informal concerns raised, such actions have not been visible or apparent to the complainant, who is left under the—mistaken—impression that they have been ignored. Clear communication and transparency is key.

Concerns that are voiced—even on an informal basis—should be taken seriously, since they tend to escalate into formal whistleblows—and, possibly, attract enhanced sanctions from the regulator—if unaddressed. The very fact that someone has expressed a concern should put the recipient on alert and prompt appropriate responsive action. What is "appropriate" in any given situation will depend upon, amongst other things, the relevant fact-pattern, context, and its inherent risk profile. A thoughtful determination as to the proportionality of any response will also need to be made.

Poor Behaviour of Influential Senior Managers

The potentially profound adverse impact and consequences flowing from poor managerial behaviour cannot be over-emphasised, especially as this can result in a pronounced ripple effect outwards from the epicentre, often affecting multiple employees and workplace morale more generally. A significant proportion of whistleblows will reference (often as a primary concern), perceived poor or inappropriate behaviour of influential managers. This is often characterised as: intimidation, lack of self-awareness and empathy, resistance to challenge, "my way or the highway," bullying, harassment, victimisation, arrogance, snobbery, or favouritism.

Likely due in part to a continuing focus on non-financial misconduct, tolerance by firms of such poor behaviour appears to be generally waning. Indeed, many organisations are taking an increasingly dim view of such conduct, including more severe disciplinary and compensation consequences.

The approach to the behavioural skills training advocated above is the obvious key form of control in this context too.

Junior employees will tend to take their behavioural cues from their direct—middle—managers. Increasingly, firms are instituting interactive scenario-based training specifically focused on supporting and developing the behavioural skills of middle managers. Middle managers have an integral role to play in promoting—and overseeing adherence to—values and, more generally, in setting the "tone from above."

Numerous organisations have implemented internal respectfulness initiatives, such as: the express incorporation of "respectfulness" into corporate values statements, and the inclusion of specific respectfulness questions in 360-degree assessment processes and employee engagement surveys.

Actual or Perceived Management Hypocrisy

Actual or perceived management hypocrisy is often characterised by whistleblowers as management failure to "walk the talk," "practise what they preach," or "set a good example." In Latham's experience, such employee sentiments commonly result in significant resentment and disaffection within certain areas of the workforce, with a consequential adverse impact on productivity, creativity, and workplace morale, and a general lack of "buy-in" to corporate culture programs.

Engagement surveys, pulse checks, and exit interviews are customary ways in which employee sentiment is routinely gauged. Ideally, these mechanisms would incorporate specific questions relating to the perception of management—in particular, whether management is regarded as setting a strong and positive example and "living by" espoused corporate values.

As with all such methods of assessing employee sentiment, it is essential that results and feedback are —and are seen to be—critically and objectively analysed and, if appropriate, acted upon. For instance, feedback suggesting that there is a widespread perception of management hypocrisy should be investigated further and addressed.

Actual or Perceived 'Tick Box' Culture

The alleged existence of a "tick box" culture represents a recurrent theme in whistleblowing investigations and is a commonly referenced feature of public whistleblows. In essence, such a contention is tantamount to an assertion that form overrides substance, and that the firm predominantly considers optics, rather than meaningful and authentic action.

Some whistleblowers may have misconstrued a lack of visible action as inertia, inauthenticity, or disinterest. This risk can be mitigated through, again, a combination of clear, transparent, and consistent communication, as well as embedded—institutional and individual— perceptual awareness.

By way of a simple "good practice" example, many organisations will routinely convey substantive "all-firm" feedback on key points arising from a recent engagement survey and any responsive actions being taken—ideally, including timelines and accountabilities. This should help counter any suggestion that the firm is simply "going through the motions"—a relatively common allegation in circumstances in which meaningful post-survey feedback is not provided.

Failure to Keep Pace With a Changing Environment

The social environment in which we live continues to change rapidly. For example, recent movements such as BLM and #MeToo have had profound impacts globally. Fundamentally, behavioural expectations and norms are evolving.

For instance, Latham has observed several whistleblow cases in which younger-generation employees have taken offence at words or conduct of more senior—typically, older colleagues—more often than not, with the latter not having intended to cause offence or even having realised that they had done so. Real-life examples include sexual innuendos made in front of others, use of inappropriate terms in the workplace, and inappropriate practical jokes.

A common contention made by the more senior individual is that their words were merely "harmless banter." While the words may have been intended as such, the risk is that they can—and do—cause offence to others in proximity. In other words, it is the effect, not the intent that matters in this context. The mere fact that this type of behaviour may have been tolerated in the past does not, of course, mean that it is appropriate today.

This is another area in which perceptual awareness is crucial. Latham has run multiple workshops for senior managers focused on this. Interestingly, in virtually all cases, participants who might have been classed as "skeptics" at the start of the session were not by the end. In Latham's experience, a combination of thorny interactive scenarios and real "war stories" have proved to be very effective in enhancing perceptual awareness.

Clearly, some will still harbour personal views—to which they are clearly entitled—that these developments are "woke" and something of a distraction. However, and crucially, this cohort must nevertheless recognise that their words and behaviour need to be refined to help reduce the risk of offence to those around them. Latham has observed various unfortunate scenarios in which a failure to modify behaviour accordingly has resulted in the dismissal for gross misconduct of the perpetrator.

Weak Retaliation Monitoring Controls

A material number of whistleblows emanate from a perception formed by the complainant that they have suffered retaliation of sorts, directly resulting from their initial informal raising of an issue or their filing a formal whistleblow about a different matter. In effect, a complainant who alleges retaliation is making a fresh whistleblow—namely, that they have been retaliated against by virtue of speaking up.

Retaliation can occur in different forms, some more obvious than others. For instance, exclusion—for no legitimate reason—from meetings to which a whistleblower was formally invited could potentially be construed as retaliation.

There is significant variance across the financial services industry in respect of the quality and sophistication of firms' retaliation monitoring controls and safeguards.

While there is no prescriptive formula per se, all organisations are expected to take meaningful and proportionate measures to mitigate against the—potentially existential—risk of whistleblower detriment. For example, some firms will proactively scrutinise end-of-year bonus and promotion processes to ensure that a whistleblower does not suffer any detriment by virtue of having spoken up. Others will additionally undertake specially-targeted communications monitoring and surveillance.

Inadequate Governance & Oversight

Inadequate governance and oversight is inextricably linked to several of the above drivers. In practice, this will often be exhibited via:

- Insufficient focus on, and prominence of, whistleblow drivers within the organisation's governance framework.
- A discernible failure to "join the dots" or even to attempt to do so. In particular, the absence of routine and systematic trend/theme identification.
- Weak metrics and inadequate management information (MI), leading to poor visibility of underlying whistleblow drivers and themes.
- A reluctance/failure to investigate underlying root causes of incidents, resulting in missed opportunities to identify potentially troubling themes or trends.

Conclusion

This guide is intended to help organisations help themselves by focusing on some of the most common whistleblow root causes. When reviewing their policies with the Sample Questionnaire – Whistleblower Policy Evaluation, firms might benchmark/self-assess against the observations, practical insights, and reflective questions included in this guide.

Performed objectively, such an exercise can serve as a constructive catalyst for a more concerted, focused, and refined approach to the underlying whistleblow drivers and themes. Ultimately, this should hopefully culminate in a marked reduction of instances in which employees feel compelled to blow the whistle. And, in turn, this should lead to material savings in terms of the associated total amount of cost, internal disruption, and management time involved in whistleblow investigations.

With assistance from Becky Critchley and Charlie Bowden, Latham & Watkins

Whistleblower Policy Evaluation

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With a marked recent increase in the number of whistleblows across the financial services sector, this guide highlights recurrent themes and common drivers, and poses gently provocative self-assessment questions against which firms can usefully benchmark themselves.

See Professional Perspective - Recurrent Themes & Common Drivers of Whistleblows.

Actual or Perceived Impropriety

Actual or perceived impropriety accounts for arguably the greatest number of whistleblows. Organisations will routinely implement systems and controls, policies, and procedures—a key function of which is to help reduce the risk of impropriety, for instance, legal, regulatory, or ethical violations. In order to reduce actual or perceived impropriety, firms should ask the following questions:

- Are we equipping—training—our managers with the necessary behavioural skills, including perceptual and self-awareness?
- How effective are these measures? How do we test their efficacy?
- Has the firm encountered any recent incidents, such as whistleblows, which indicate that there is room for improvement in this regard?
- Have we recently reviewed the content and effectiveness of our communications and transparency policies and practices?
- Do they reinforce the importance of message clarity?

Actual or Perceived Unfairness, Inequality, or Inconsistency

The vast majority of organisations espouse corporate values, with which they and their employees are expected to continually adhere. Preferential, unfair, unequal, or inconsistent treatment represents one of the most common whistleblow drivers.

- Invariably, such corporate values will include, amongst others, a commitment to fairness, equality, and consistency. In order to assess those commitments, firm should ask the following questions: Are we actively and consciously monitoring disciplinary/conduct/performance management outcomes over time to ensure fairness, equality, and consistency and, more generally, alignment of outcomes with espoused corporate values?
- Could we cogently explain, by reference to written records, why any apparently more lenient sanction was imposed on a senior employee, compared with a junior colleague—in respect of a substantively similar fact-pattern?
- Do our processes/protocols appropriately reflect the general regulatory principle that the more senior an individual, the commensurately higher the conduct standards that are expected of them?
- Are these policies/protocols effective?

Failure to Listen to Concerns Raised Informally

Most organisations today will actively promote and pursue a "speak-up" or "psychologically safe" culture whereby employees are encouraged to raise concerns, self-identify errors, and make constructive challenges, without fear of adverse consequences. Regulators continue to emphasise the paramount importance of such a culture and will likely take a dim view of any indications to the contrary.

However, "speaking up" will prove futile unless the organisation actually listens and responds appropriately. To gauge receptiveness and response, the firms should ask the following questions:

- Are we training our managers to understand and appreciate that informal concerns that employees raise must be taken—and, importantly, be seen to be taken—with appropriate seriousness?
- Do we objectively assess, demonstrably address, and meaningfully present the findings of employee engagement surveys—or similar sentiment-gauging mechanisms?
- Is guidance available to managers who require assistance with a particular situation?
- Do we have an agreed protocol as to how such situations should be recorded/documented? If not, should we?

Poor Behaviour of Influential Senior Managers

The potentially profound adverse impact and consequences flowing from poor managerial behaviour cannot be over-emphasised—especially as this can result in a pronounced ripple effect outwards from the epicentre, often affecting multiple employees and workplace morale generally.

A significant proportion of whistleblows will reference, often as a primary concern, perceived poor or inappropriate behaviour of influential managers. To address the concerns of these whistleblows, firms should ask:

- Are we acting consistently and robustly when faced with poor managerial behaviour?
- How is this tested/overseen?
- Are we genuinely able to say that there is no one individual who is too important, or too senior, to be treated differently?
- How effectively do we equip our managers with the requisite behavioural skills, including empathy and self-awareness?
- Is this borne out by the evidence—e.g., the number of relevant whistleblows?
- Do our middle managers receive appropriate awareness training?
- Does respectfulness feature sufficiently within our corporate values statements, employee assessments—or scorecards—and engagement surveys?

Actual or Perceived Management Hypocrisy

Actual or perceived management hypocrisy is often characterised by whistleblowers as management failure to "walk the talk," "practise what they preach," or "set a good example."

These types of employee sentiments commonly result in significant resentment and disaffection within certain areas of the workforce, with a consequential adverse impact on productivity, creativity, and workplace morale, and a general lack of "buy-in" to corporate culture programs. To gauge employee sentiment and firm response, firms should ask the following questions:

- Do we routinely and systematically gauge employee sentiment in relation to perception of management?
- If so, are the results and feedback objectively reviewed and, where necessary, acted upon? Is this visible to employees?
- Does the CEO periodically emphasise to senior managers the importance of demonstrable role-modelling?
- Do senior managers cascade this message downwards?

Actual or Perceived "Tick Box" Culture

The alleged existence of a "tick box" culture represents a recurrent theme in whistleblowing investigations and is a commonly referenced feature of public whistleblows. In essence, such a contention is tantamount to an assertion that form overrides substance, and that the firm predominantly considers optics, rather than meaningful and authentic action. In order to avoid "tick box" culture, or the appearance of, firms should ask:

- Are the results of, and feedback from, employee sentiment-gauging exercises objectively reviewed and, where necessary, acted upon?
- Are reviews and any necessary action visible to employees?

Failure to Keep Pace With Social Movements

The social movements in which we live continues to change rapidly–for example, recent movements such as BLM and #MeToo have had profound impacts globally. Fundamentally, behavioural expectations and norms are evolving at pace. In order to align whistleblower policies with social movements, firm should ask:

- Do we recognise generational differences as a potential cause of issues?
- What steps are we taking in practice to help our managers' levels of awareness in this context?
- Are we monitoring the efficacy of these measures?
- For example, are we experiencing a reduction in banter-related cases?
- Are we acting credibly/sufficiently robustly in instances in which inappropriate outdated behaviour is identified?
- Do we engage in a cyclical review of our practices to account for the fact that what is appropriate–and what is not–can change in a relatively short space of time? What might have been acceptable five years ago may not be today–and our training and materials need regular refreshing with that in mind.

Weak Retaliation Monitoring Controls

A material number of whistleblows emanate from a perception formed by the complainant that they have suffered retaliation of sorts, directly resulting from either their initial informal raising of an issue or their filing a formal whistleblow about a different matter.

In effect, a complainant who alleges retaliation is making a fresh whistleblow–namely, that they have been retaliated against by virtue of speaking up. Firms should ask key questions about retaliation, including:

- Are our retaliation monitoring controls and safeguards sufficient and effective?
- When were they last independently reviewed?
- Does our managerial training reference the importance of avoiding retaliation–including in its less obvious forms, such as exclusion?
- Are any instances of retaliation treated with appropriate–credible–consequences–including escalation within the governance framework?
- Do we adequately and effectively articulate the anti-retaliation controls that have been implemented to provide a degree of reassurance to prospective whistleblowers and, equally, a deterrent to those with influence over the whistleblower?

Inadequate Governance & Oversight

Inadequate governance and oversight are inextricably linked to several of the above drivers. In addition to those drivers, firms should ask themselves the following regarding governance frameworks and policies:

- Are the whistleblow drivers and themes –as discussed in this guide–meaningfully considered at an appropriate level within the firm's governance framework?
- Is this adequately documented?
- Are the relevant metrics and generated management information (MI) sufficiently comprehensive and informative?
- Is trend identification a routine feature? Are the measures taken to identify themes sufficient?
- Are root-cause analyses routinely undertaken–with a view to understanding how and why an incident occurred, and to help prevent recurrence?
- Are periodic reviews undertaken to help ensure that relevant measures/controls implemented are operating effectively?
- For example, do we critically annually assess the number and type of whistleblows that occurred to identify further areas for enhancement, new emerging themes or trends, and whether the controls put in place are proving to be effective?

With assistance from Becky Critchley and Charlie Bowden, Latham & Watkins