

May 29, 2017

Association of Corporate Counsel's response to the European Commission consultation on whistleblower protection

The Association of Corporate Counsel submits this supplemental position paper in connection with its response to the European Commission's consultation whistleblower protection.

The Association of Corporate Counsel (ACC) is a global bar association for in-house lawyers. ACC has more than 42,000 members in 85 countries, including more than 2,300 members across Europe. As in-house counsel are often responsible for maintaining their companies' legal and regulatory compliance, our members have a vested interest in ensuring that whistleblowers feel safe to report instances of suspected corporate misconduct. Our members are employed by public and private corporations, associations, and other entities that rely on whistleblowers to receive information about potential corporate misconduct.

Given the importance of whistleblowing to the maintenance of corporate legal and regulatory compliance, we wish to highlight two considerations that the Commission does not raise in its consultation. First, we encourage the Commission to consider the importance of internal reporting and compliance systems in the business world and not impose requirements that undermine the effectiveness of corporate compliance programs. Indeed, the European Commission should incentivize companies to create robust ethics and compliance programs. Second, we encourage the Commission to consider the important role that in-house counsel and legal professional privilege play in corporate compliance programs and not create policies that restrict the ability of in-house counsel to contribute to their companies' compliance functions.

Incentivizing corporate compliance programs will enhance the value of whistleblower tips and provide whistleblower protections

Whistleblower tips are a crucial source of information for companies trying to address misconduct by employees. However, they would not be an effective means of rooting out corporate misconduct without a multi-faceted corporate compliance program that trains employees to recognize wrongdoing, encourages

employee reporting of wrongdoing, and investigates and remediates instances of wrongdoing.

In focusing on whistleblowing in a vacuum, the Commission misses the opportunity to encourage an overall culture of compliance within European companies. A culture where whistleblowers not only recognize potential misconduct but also feel comfortable reporting such information requires a substantial effort on the part of an organization. These efforts include the need to inculcate a shared value that all employees are responsible for ensuring that the company operates within the bounds of the law and building processes meant to detect and remediate conduct that is unethical or illegal. This is best achieved through a formal corporate compliance program.

If the Commission wants to ensure that whistleblowers are an important source of information regarding corporate misconduct, then it should also focus on how the overall legal system can incentivize the maintenance of a corporate compliance program. Various countries have done so by providing leniency to a corporation facing criminal or civil charges if there is evidence of a strong corporate compliance program; they have also incentivized voluntary disclosure and cooperation with the government.

Encouraging internal corporate policies that protect whistleblowing employees from retaliation is but one aspect of a strong corporate compliance program. We submit that strengthening one component of corporate compliance programs (whistleblower protections) without also incentivizing companies to maintain the other components of compliance programs (education, reporting, investigation) would be a missed opportunity for the Commission to leverage and encourage the many European companies that already have strong corporate compliance programs. If the Commission were to offer guidance as to what a strong compliance program consists of, and then incentivize the maintenance of such programs, it would reap the benefits of companies becoming more ethical and legally compliant.

In-house counsel play an important role in corporate compliance and need to maintain legal professional privilege / professional secrecy

If a whistleblower's allegations of wrongdoing rise to the level of legal liability, then lawyers must become involved to properly address the matter. In many EU member states, in-house counsel enjoy the same legal professional privilege (or professional secrecy) as their outside counsel counterparts. Having privilege in the context of an internal investigation allows in-house counsel to quickly and more effectively

investigate alleged wrongdoings, because employees can freely discuss the facts without fear that sensitive information will be unnecessarily disclosed. Legal professional privilege strengthens the unique compliance role that in-house counsel occupy within businesses by allowing for full and frank discussion of legal issues between in-house counsel and company employees.

Experience in other countries with whistleblower programs has shown that employees prefer to report their suspicions of misconduct internally. They want to know that their suspicions will be investigated by those competent to do so. Yet, for companies of scale, having to hire outside counsel to investigate every whistleblower tip is not a practical solution. For this reason, it is important to preserve the ability of in-house counsel to maintain privilege protections consistent with their national law. Indeed, ACC believes that strengthening the ability of in-house counsel to address whistleblower tips helps contribute to strong corporate compliance programs. In-house counsel want to help their companies comply with the law. When the role and status of in-house counsel is elevated, it benefits everyone.

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