

Whistleblowing certification regime launched

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White Collar Crime, Japan

- 🕒 **Background**
- 🕒 **Overview of WCMS certification regime**
- 🕒 **Certification standards**
- 🕒 **Comment**

Background

Over the past decade, a number of significant regulatory and compliance issues have affected large multinationals based in Japan. Some of these have become public scandals that have led to:

- significant litigation;
- large regulatory fines;
- the divestiture of key assets; and
- resignations by senior management, including board members.

One theme that emerged from a number of these investigations was that the conduct in question was often not reported via the company's whistleblowing system that existed at the time. As a result, several reports recommended changes to corporate whistleblowing systems which, in hindsight, were deemed to have been functioning incorrectly.**(1)**

The Consumer Affairs Agency**(2)** launched an independent investigation into the issue. It established the Committee in relation to Improving the Effectiveness of Whistleblowing Systems, which was chaired by Katsuya Uga, a former professor at the University of Tokyo's Graduate School of Law and Politics. In its final report published on 15 December 2016, the committee suggested that the establishment of a whistleblowing certification system would incentivise businesses to voluntarily enhance their own whistleblowing systems and thereby gain the trust of various stakeholders, including shareholders, counterparties and consumers.

Following the committee's recommendations, the Consumer Affairs Agency created a certification regime for corporate whistleblowing systems (the whistleblowing compliance management system (WCMS)).**(3)** The organisation designated to oversee registrations began accepting applications on 12 February 2019 and, as of 30 April 2019, five Japanese companies had been listed as registered businesses under the WCMS certification regime.**(4)**

Overview of WCMS certification regime

There will ultimately be two types of WCMS certification regime:

- a self-declaration of conformity system; and
- a third-party certification system.

To date, only registrations under the former system have been granted. The third-party certification system is expected to be launched in the near future and to incorporate administrative lessons learned from the operation of the self-declaration system.

The self-declaration system operates on a simple premise: if a corporate entity evaluates its own whistleblowing system and concludes that it complies with certain certification standards (described below), the entity may submit an application to the designated registration organisation. The designated registration organisation will then review the application to ensure that it meets the certification requirements.**(5)** If the application is accepted, the designated registration organisation will:

- register the applicant; and
- grant it the right to use the official WCMS symbol.

An application to renew a registration must be submitted annually.

Certification standards

In order to register under the WCMS certification regime, applicants must affirm that their whistleblowing system satisfies certain certification standards. These standards consist of 25 mandatory and 13 optional criteria. For an application to be accepted, the whistleblowing system must satisfy all of the mandatory criteria and at least six of the optional criteria.

The certification standards are based on the Guidelines for Business Operators regarding the Establishment, Maintenance and Operation of Internal Reporting Systems based on the Whistleblower Protection Act,**(6)** which were published by the Consumer Affairs Agency on 9 December 2016.

The mandatory criteria include:

- the implementation of company-wide training in relation to the operation of a whistleblowing system;
- the ability to make reports anonymously; and
- a prohibition on retaliatory measures against whistleblowers.

The manner in which a registration organisation applies the certification standards and the precise threshold that applicants must meet within each category is unknown. For instance, it is unclear whether there is a minimum completion rate for training before registration or whether it is sufficient for a training programme to exist, even if rates of completion are low.

Comment

Robust whistleblowing systems that guarantee anonymity and confidentiality can play an important role in warning senior management of compliance risks early on. A properly functioning system can also give companies the opportunity to prevent risks from materialising or at least minimise more serious damage in relation to risks that have already materialised. As such, the establishment of an effective whistleblowing system is an indispensable part of good corporate governance.

The WCMS certification regime is in its infancy, but there are already signs that companies are embracing the self-certification aspect. Inhouse compliance professionals will no doubt follow closely for signs that the regime is becoming a market standard. Widespread adoption of the self-declaration system may also indicate companies' appetite to participate in the third-party certification system when it is eventually launched.

For further information on this topic please contact John Lane or Hiroki Ishii at Nagashima Ohno & Tsunematsu by telephone (+81 3 6889 7000) or email (john_lane@noandt.com or hiroki_ishii@noandt.com). The Nagashima Ohno & Tsunematsu website can be accessed at www.noandt.com.

Endnotes

- (1) See reports in relation to Toyo Tire Corporation dated 19 June 2015 and Toshiba Corporation dated 20 July 2015.
- (2) The Consumer Affairs Agency is overseen by the Cabinet Office.
- (3) On 19 December 2018 the Public Interest Incorporated Associations, Japan Institute of Business Law (*Shojihomu-kenkyukai*) was designated as the registration organisation under the WCMS certification system.
- (4) The list of registered businesses can be found on the registration organisation's website.
- (5) Although the designated registration organisation reviews applications, the scope of its review process is limited and does not guarantee the effectiveness of an applicant's whistleblowing system.
- (6) An English translation of the guidelines is available on the Consumer Affairs Agency's website.

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