Building Effective Whistleblowing Programs

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Why are whistleblowing programs important?

- U.S. companies lose over $400 billion a year to fraud.

- Average loss per company: $2,199,930.

- 37% of respondents report significant economic crimes during past 2 years.

- Auditors only detect approximately 19% of all frauds.

- The largest frauds/bankruptcies in history occurred during the past 3 years.

- Approximately one third of American employees have witnessed unethical or illegal conduct in their workplace. Of these, over half did not disclose what they observed.

- Employees typically have limited knowledge of who to contact if they become aware of inappropriate acts in the organization.

- An analysis of business crises between 1990 and 2000 found that management is frequently aware of problems, and ignores them until a crisis develops or an employee blows the whistle on the activity.

- Auditors cannot audit every process and transaction all the time.

Some whistleblowers

Employee	Organization	Regarding/Results
– Cynthia Cooper	WorldCom	$104 billion bankruptcy
– Sherron Watkins	Enron	$63 billion bankruptcy
– Coleen Rowley	FBI	9/11 terrorist attacks
– Erin Brockovich	Pacific Gas & Elec. Co.	$333 million settlement
– Frederick Whitehurst	FBI	Evidence tampering
– Dr. Jeffrey Wigand	Brown & Williamson	Effects of nicotine
– Randy Robarge	Com Ed's Zion plant	Radioactive materials
– Keith Schooley	Merrill Lynch	Management misconduct

What has been done about it?

- SEC, NYSE, NASDAQ regulations enhanced

- At least 13 other related pieces of legislation passed in history

- At least 47 states have laws protecting whistleblowers

- Federal Sentencing Guidelines

- Sarbanes-Oxley Act passed in July 2002
  - Section 301.4: Audit Committees must establish
    whistleblowing programs
  - Section 806: Protection for whistleblowers at public companies
  - Section 1107: Penalties for retaliation

Key Factors for Success

- Accessibility

  The program must be accessible easily and cheaply to all employees through multiple channels

- Strong and Consistent Tone at the Top

  Management must send clear and consistent messages of what is expected of all employees
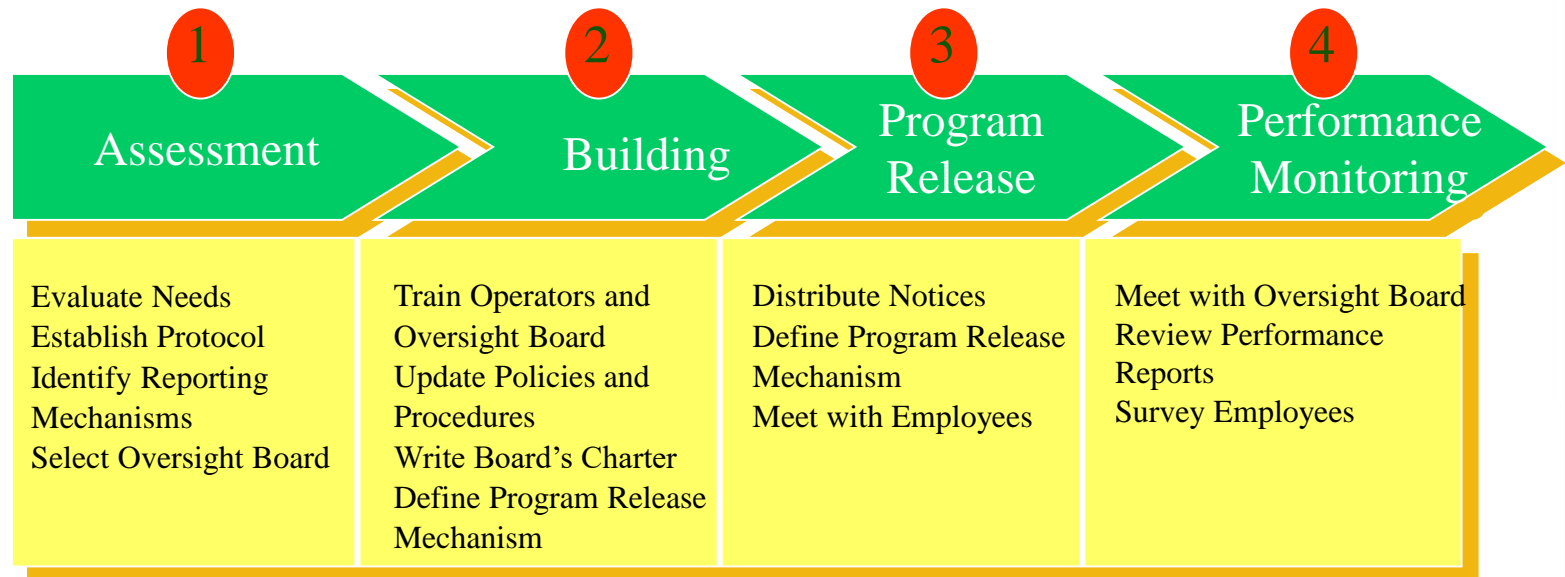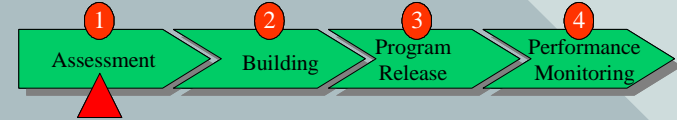
- Strong Support Network

  Whistleblowers need support at work, home, and from peers

Key Factors for Success (continued)

- Build Widespread Awareness and Support
    - Of the program's existence and avenues for disclosure
    - Of support from Management and Board of Directors
    - Of the connection to the organization's Code of Ethics

Development Phases

1 Assessment → **2** Building → **3** Program Release → **4** Performance Monitoring

1 — Assessment
Evaluate Needs
Establish Protocol
Identify Reporting Mechanisms
Select Oversight Board

2 — Building
Train Operators and Oversight Board
Update Policies and Procedures
Write Board's Charter
Define Program Release Mechanism

3 — Program Release
Distribute Notices
Define Program Release Mechanism
Meet with Employees

4 — Performance Monitoring
Meet with Oversight Board
Review Performance Reports
Survey Employees

Development Phases

Assessment

- Geographic coverage and linguistic groups
- Protocol

Case Numbers	Response times
Contacts	Escalation procedures
Information/ID safety	Discretion
Reporting	Qualifications

- Avenues for disclosure

Toll-free phone lines	Fax
Ombudsperson	E-mail
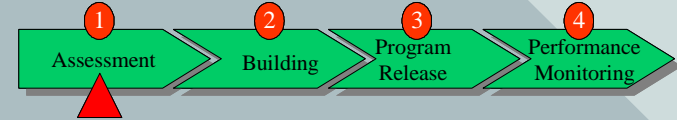
Development Phases

Assessment (continued)

- Staffing Solution

In-House	Out-Source

- Manager of the Program

Independence	Qualifications
Funding	Staffing

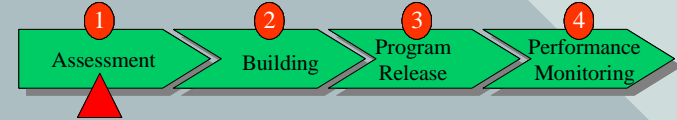- Response Team

Internal Audit	Legal
Accounting/Finance	Human Resources
IT	Operations

Development Phases

Assessment (continued)

- Oversight Board

Composition	Responsibilities
Meetings	Reporting
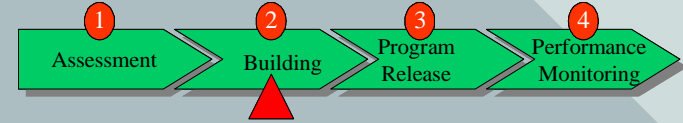
Development Phases

Building

- Logistics

Hire staff	Organize Boards
Install equipment	Set meeting calendar

- Training

Operators	Management
Board of Directors	Oversight Board

- Policies and Procedures

Operating P&Ps	Employee manual
Charter(s)	Code of Ethics
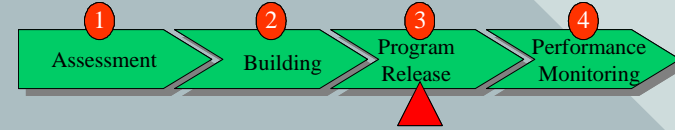
Development Phases

Program Release

- Options

  Face to Face   Memo / e-mail

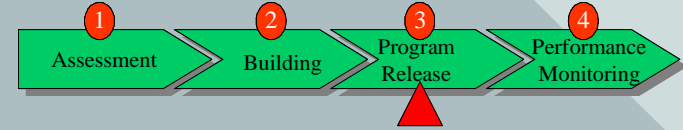 Computer Training   Train the trainer

  Video / Voice Conference

- Management Participation

- Employee Meetings

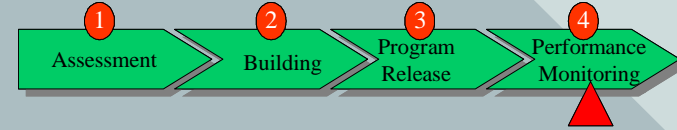 Logistics: size, length, mandatory attendance

  Agenda: purpose, importance, management's
  commitment, protections, professionalism,
  no exceptions, <u>will investigate all allegations</u>

Development Phases

Program Release (continued)

- Extent of Release

  Ideally all locations simultaneously

  Largest facilities with face-to-face meetings

- Facilitator

Development Phases

Performance Monitoring

- Activities

  Reporting: Monthly to Oversight Board

                Quarterly to Audit Committee

                Include cycle times, totals, categories

  Meetings: Oversight Board at least monthly

- Employee Surveys

  Annual, anonymous, company-wide surveys

- Reminders

  With conflict of interest statements

  During annual staff meetings

Risks and Challenges

- Most whistleblowers suffer

Harassment	Retaliation
Alienation	Intimidation
Discrimination	Job loss / blacklisted
Stress / emotional hardship	Family hardship-divorce

- Corporate culture and sub-cultures

Different practices between senior management and field employees

- Pressure to perform

Management could, knowingly or not, send message to break rules, or employees misinterpret message

Risks and Challenges

- Employees do not know / forget who to contact
    - Post whistleblower program information prominently
    - Ombudsperson should be active and visible
    - Provide annual reminders

- Preference to confide in immediate supervisor
    - Explain avenues if immediate supervisor is suspect
    - Avenues inside and outside the organization

- Encourage internal disclosure to avoid public crisis
    - Provide support, act quickly, offer feedback and reward

Risks and Challenges

- Include international operations
    - Sarbanes-Oxley 302 and 404 implications
        - Attestation faulty if not aware immediately of irregularities in the organization
    - Even greater reluctance to blow the whistle
        - Cultural differences
        - Fewer legal protections
        - Fear of retaliation
    - Negative publicity
    - Anti-American sentiments and safety concerns

What to do when the call comes in

- Information intake.
- Assess whether this requires an immediate response.
- Inform the appropriate parties per protocol.
- Determine what additional resources are needed for preliminary conversations.
- Team must assess nature and impact of allegations
  - Is this a fraud? Has it been substantiated?
  - Is the condition ongoing? Is the loss material?
  - How many people are involved?

What to do when the call comes in

- Are outside resources needed? Consider legal assessment.
- Risks involved to individuals and organization.
- How was the issue discovered?

What to do when the call comes in

- Develop an Action Plan.
- What are the objectives?
- What do you need to meet that objective?
- What will you do with the information?
    - File civil or criminal charges?
    - Only use internally?
- Who is responsible for leading this project?
- Who else will be on this team, both internally and externally?
- Will the suspect be contacted?

What to do when the call comes in

Set timeline / deadlines for investigation

- Milestones dates. Manage each allegation like a project. Work systematically but be patient.
- When and who will be pulled into the project?
- Is there going to be a report? What will it contain?
- Who will receive updates and the final report?

Make sure to get competent advice regarding civil, criminal and employment law.

Legal Considerations

- Keep good records to protect evidence, ensure credibility and avoid claims of discrimination.
- Be patient during investigation to obtain sufficient, reliable and relevant data.
- Make sure evidence is collected and analyzed by someone with sufficient time, tools and expertise.
- Consider obtaining private investigator or assistance from law enforcement.
- Do not rush to judgment. The subject of allegation also has rights.

Legal Considerations

- Non-financial allegations (e.g. sexual harassment) can result in costly lawsuits if case is mishandled.
- Consider total costs and whether focus is prosecution, recoveries, restitution, or termination.
- Reminder that only the government can punish or prosecute. Companies discipline.
- Company discipline does not result in a public record.

Legal Considerations

Types of investigation

- Physical surveillance
- Electronic surveillance
- Research and internal audit
- Forensic analysis
- Undercover
- Interviewing and interrogation

Investigations require expertise, knowledge of private/public sources of data and being mindful of privacy laws/rights.

In-house or outsource?

1. Anonymity

   - Will employees trust the program?

   - Impact on Federal Sentencing Guidelines if judge or jury agree that employees had reasons for concern.

2. Follow Up

   - How will you follow-up with the whistleblower?

   - Vague reports can be very costly.

In-house or outsource

3. Report Retention and Tracking
   - Tool or mechanism to store information.
   - Transcribing information to ensure accuracy.
   - Who and how will you track action items?
   - Where and how do you store the information?
   - Can you restrict access to the information?
4. Is there sufficient expertise in-house?
5. Who will be available externally for assistance?
6. What are the cost implications and who will do intake 24/7?

In-house or outsource

When in doubt, hire someone.

If you are not comfortable answering most of these questions in the affirmative, outsource it.

Opportunities for Internal Auditors

- Ask employees during audits
- Be visible and active to prevent fraud
- Be technically proficient to search for indicators of fraud
- Be trust-worthy and become an avenue for disclosure
- Be a member of the response team
- Provide accounting, IT and fraud examiner expertise during investigations
- Conduct independent surveys
- If independent, audit the program

10-Step Audit Program

1. Review the program's protocol
2. Examine allegation files
3. Review composition and role of the oversight board
4. Verify the autonomy of the program
5. Review performance reports
6. Verify adequacy of the program's budget
7. Review the employee manual and code of ethics
8. Verify access to the program
9. Confirm qualifications of the staff
10. Survey employees

Goal: Corporate Environment Where

- All officers and employees act ethically and produce accurate financial statements.

- All stakeholders are treated fairly, with dignity and respect.

- All allegations of non-compliance are investigated thoroughly, professionally and promptly. Those found guilty are disciplined quickly, firmly and fairly.

- Whistleblowers receive private and/or public recognition when it is safe to do so.

Summary

- Whistleblowing programs require more than setting up a phone line, even if the program is outsourced.

- Plan, release, monitor and get feedback.

- Internal Auditors must play a key role.

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