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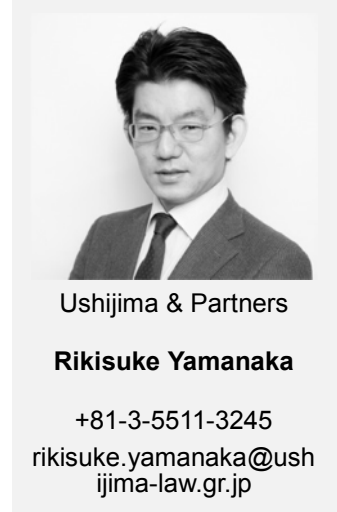
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Points to Note When a Legal Adviser to a Company Acts as an External Point of Contact for Whistleblowing

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1. Introduction — the situation surrounding introduction of internal reporting systems —

More than ten years have passed since the Whistleblower Protection Act was enforced in April 2006 and it has become a common practice, especially among large companies, to introduce an internal reporting system. In recent years, the system has also come to be widely recognized as a key component within internal control systems. In addition, listed companies are required to establish an appropriate internal structure concerning whistleblowing under Japan's Corporate Governance Code.



According to Consumer Affairs Agency report¹, 46.3% (as for companies with more than 1,000 employees, the proportion is over 90%) of all companies² have introduced internal reporting systems³.

The report says that, of the companies that have introduced an internal reporting system, 59.9% have both internal and external points of contact for whistleblowing and 7% have external only, which means that about two-thirds of such companies have external points of contact. Therefore, it can be said that having a point of contact outside the company has become a common practice.

Possible reasons for businesses' widespread establishment of external points of contact for whistleblowing include (i) the system is expected to provide objective and neutral handling of whistleblowing cases and (ii) it secures whistleblower's anonymity more easily. In this connection, Consumer Affairs Agency's Guidelines for Business Operators Regarding the Establishment, Maintenance and Operation of Internal Reporting Systems Based on the Whistleblower Protection Act, dated December 9, 2016 (the "Consumer Affairs Agency's Guidelines") state that "it is appropriate that external points of contact for reporting (for example, law offices or private professional organizations) should be maintained as much as possible."

In this regard, according to the Consumer Affairs Agency report, as many as 49.2% of the companies

¹ Consumer Affairs Agency's "Investigation Report of 2016 on Internal Reporting Systems Among Business Operators"

² The investigation conducted by Consumer Affairs Agency targeted 3,628 listed companies and randomly selected 11,372 unlisted companies, of which 3,471 companies (23.1%) responded.

³ An internal reporting system, which is based on the Whistleblower Protection Act, is a structure within a business operator. In line with the structure, a business operator receives internal reports about alleged wrongful acts from its employees or other members, and takes appropriate response measures including investigation, rectification and recurrence prevention, while providing protection to the whistleblowers.

that have an external point of contact for whistleblowing entrust their legal advisers⁴ to act as a point of contact. As for companies with more than 1,000 employees, a majority of them also entrust their legal advisers to act as a point of contact (while 21.6% of such companies entrust lawyers who are not their legal advisers with the same work).

Two main reasons why so many companies entrust their legal advisers to act as a point of contact are as follows: first, it is expected that lawyers who are familiar with the ongoing state of affairs in the company can take prompt and adequate measures; and second, it is economical in terms of costs (compared to entrusting other lawyers with the same work).

Given such a situation, the discussion below addresses the role of lawyers as external points of contact for whistleblowing, points to note when entrusting one's legal advisers to act as a point of contact, and measures that companies should take moving forward.

2. The role of lawyers as external points of contact for whistleblowing

When lawyers are entrusted to act as external points of contact for whistleblowing, in some cases their role is limited to only act as a point of contact (i.e., only to receive reports and notify whistleblowers of the results of relevant investigations and the company's conclusions), and in other cases they take on an expanded role that may involve conducting investigations, making legal decisions, and advising on rectification measures (in the case of the former limited role, such tasks are handled by other departments), in addition to acting as a point of contact.

The extent that such lawyers are involved in the investigations, etc. of whistleblowing cases depends on the scale of the company and the actual circumstances of the organization, and it is possible that each case will require a different response.

In most cases, however, whistleblowers generally expect such lawyers themselves to conduct the investigations and make legal decisions. Therefore, it is necessary to note the possibility that whistleblowers may feel as though "reporting to an external point of contact was meaningless because it was not any different from reporting to someone in the company," in cases where the lawyers act only as a point of contact (by notifying whistleblowers of the results of relevant investigations and the company's conclusions, but nothing more).

Even in cases where lawyers simply act as a point of contact, placing lawyers as external points of contact is advantageous because it is easier to secure whistleblowers' anonymity. Whatever role lawyers may assume as external points of contact, it is essential to give a full explanation to employees and other staff members about the existence, purpose, and proper use of their company's external point of contact so as not to disappoint whistleblowers.

3. Points to note when entrusting one's legal advisers to act as an external point of contact

First, if a company's legal advisers act as an external point of contact, it is conceivable that whistleblowers may hesitate to report issues because they fear their reporting might be leaked to the company, which diminishes the original purpose for establishing an external point of contact.

Therefore, to avoid deterring potential whistleblowers, careful attention is needed when notifying employees or other members about the role of the legal advisers as a point of contact, and employers should explicitly explain that such lawyers are obligated to keep whistleblowers' anonymity.

⁴ Legal advisers are the lawyers who are entrusted with legal services by a business operator regardless of the existence or non-existence of an advisory contract between them.

Second, it should be noted that there is an indication that this internal reporting system may constitute a conflict of interests. For example, there is a view that reporting to a legal adviser who acts as an external point of contact is, substantially, no different than “consulting” with a lawyer; therefore, if there is a difference of opinion between a company and its employee, the legal adviser’s role to act as a point of contact for whistleblowing would constitute a conflict of interests.

Regarding this point, one response is that such issue can basically be avoided by explicitly telling the whistleblower, at the time of internal reporting or on other occasions, the fact that the legal advisers are not attorneys or advisers of the whistleblower, which seems a sufficiently reasonable argument. However, if seen from the standpoint of a whistleblower, it cannot be denied that a whistleblower could suspect that a legal adviser to a company is unable to maintain neutrality when conducting investigations and making legal decisions.

Considering the above, when entrusting one’s legal advisers to act as an external point of contact for whistleblowing, measures and policies should be taken to eliminate conflicts of interest and ensure that the external point of contact is neutral and impartial, and employees should be given an explanation about such measures and policies.

In this regard, the Consumer Affairs Agency’s Guidelines state that “if outsourcing work such as receiving reports, or investigating the facts pertaining to reports, the use of law offices or private professional organizations that may raise doubts as to their neutrality or impartiality or create conflicts of interest must be avoided.” Thus, rather than uniformly requesting the avoidance of entrustment to one’s legal advisers⁵, the Guidelines seek to ensure neutrality and impartiality of such external point of contact and to eliminate conflicts of interest.

4. Measures companies should take moving forward

As mentioned above, there can be several issues when entrusting one’s legal advisers to act as an external point of contact. From the perspective of eliminating doubts among whistleblowers and encouraging internal reporting, it is also advisable to consider entrusting lawyers who are not one’s legal advisers to act as an external point of contact.

When entrusting one’s legal advisers to act as an external point of contact due to such reasons as cost efficiency, employees and other staff members should be given a sufficient explanation that whistleblowers’ anonymity, together with neutrality and impartiality of the external point of contact and elimination of conflicts of interest, will be ensured. It may also be worthwhile to consider entrusting lawyers, who are not one’s legal advisers but belong to the same law firm as the legal advisers, to act as an external point of contact. In that case, a “firewall” should be constructed between the legal advisers and the external point of contact, and employees should be given explanations that information will not be shared among the legal advisers and the lawyers in charge of the external point of contact.

End

⁵ No. 58 and other parts of “Regarding the results of solicitation of opinions concerning ‘Guidelines for Business Operators Regarding the Establishment, Maintenance and Operation of Internal Reporting Systems Based on the Whistleblower Protection Act’ (draft),” which was released on December 9, 2016.