Whistle-blowing program best practice —
Some policy considerations for the Global Fund

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Since a whistle-blowing program (reporting line, hotline, tip-offs line) is controversial in some societies for historical or cultural reasons, this document is somewhat more discursive than simply offering the barebones of a best-practices policy. The idea is to put potentially controversial aspects of such a program on the table for discussion and debate, with a view to reaching a better understanding of and greater consensus on what might be required.

A whistle-blowing program is one of several best-practice, operational expressions of an organization's concrete efforts to build a *responsible, ethical organizational culture*, requiring conscious and unwavering board and management commitment.

Some observations in this document relate to whistle-blowing in companies, but appropriate adjustments for an organization like the Global Fund can easily be made.

A. Background — Whistle-blowing or reporting as a component of an organizational ethics program

An organization's ethics should be *managed actively*. This is done through an *organizational ethics program, a component of which is a whistle-blowing or reporting program.*

An ethics program has five components, and together they express the best-practice principles set out in the *US Federal Sentencing Guidelines for Organizations* (FSGO, 1991, 2004) and adopted by corporate governance best-practice documents.

The five components require an organization to:

> a. *Commit* — Executive and senior management commitment to the program;
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> b. *Assess* — Measure the organization's ethical effectiveness and ethical culture;
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> c. *Codify* — Develop a Code of Ethics — A values statement and conduct provisions (code of conduct) that communicate with each other;
>
> c. *Formalize* — Set up formal ethics structures, such as an ethics office with an ethics officer, ethics committee, ethics training, ethics communication systems, and an ethics line (encompassing a hotline and help line); and
>
> d. *Integrate* — Make the formal structures work efficiently and build an ethical culture that legitimizes ethics discourse and conduct.

Organizations may only have some of these components in place. Developing a comprehensive ethics program should, however, not require a whole new layer of bureaucracy. It should be a cross-functional facility tapping into existing resources and structures, and involving all organizational units. Ethical responsibility should be located in every member of the organization and not merely in a dedicated organizational function.

Conceptually, ethics, or responsible conduct, is the reason for corporate governance best practice; operationally, an ethics program is an aspect of corporate governance best practice.

As part of an ethics program, a reporting program is a *legal and ethical misconduct prevention and detection strategy*, or *risk management intervention*, to combat theft, fraud, corruption, illegitimately gain arising from conflicts of interests, and the like.

Several laws encourage reporting misconduct and offer whistle-blower protection, such as the UK *Public Interest Disclosure Act*, July 1999, the US *Sarbanes-Oxley Act* of 2002, and South Africa's *Protected Disclosures Act*.

B.   Components of a robust whistle-blowing or reporting program

For a reporting line to be robust and effective, it needs to conform to a number of key best practices. I mention and discuss eleven such best practices.

At places I indicate some of the implications of these best practices for the Global Fund, taking account of the Fund's particular circumstances.

1.   Communication

The program needs to be announced widely, to all levels of employees. The announcement must have a clear message and repeated regularly. This communicates that the program enjoys support at the highest level, that management believes it to be important, and that using the program is an act of loyalty, not disloyalty or petty snitching.

The Global Fund needs to decide what the reach of its program should be and, therefore, to whom it should be communicated as an available facility. In particular, it needs to be decided whether it should be a program for the board, Secretariat and Technical Review Panel (TRP) only, or whether it should also operate on a country level — in respect of Country Coordinating Mechanisms (CCMs), Principal Recipients (PRs) and local procurement and supply chains.

2.   Accessibility

The program must be accessible in various languages, consider the impact of time zone differences on the effectiveness and accessibility of call centers, and offer persons reporting several different avenues for reporting, which becomes particularly important with increasing gravity of the wrongdoing alleged.

These considerations would all be important should the Global Fund's program be intended for the whole donor-recipient chain across many different countries.

3.   Cultural appropriateness

The program needs to be adapted to the constraints imposed by local culture, history and practice.

Research shows that the greatest obstacle to an effective reporting system is "cultural resistance". In some countries, historical memories associate reporting to the authorities with being a traitor or snitch.

For the Global Fund this means that the reporting program should account for cultural preferences. For example, the name of the program should be sensitive to local interpretations and sensitivities. The program should be described in words that are considered "neutral" in a culture or language, such as "intervention", but not "informant". Or the "employee protection" of the program should be emphasized, rather than positioning it as something that aims to "incite snitching".

4.   Universality

Make the reporting mechanism available to relevant third parties, for example suppliers, distributors, consultants, contractors, or customers. Corruption requires the participation of two parties, the corruptor (bribor) and corruptee (bribee). The legal record shows that the great majority of bribery prosecutions involve a third party.

Making a reporting line available to this group may not only reduce the incidence of bribery, but may help to expose kick-back schemes whereby rogue insiders demand payment form key suppliers.

5.   Confidentiality and anonymity

An ethics program must guarantee confidentiality and permit discreet or anonymous reports.

Building organizational trust and fostering open discussion require that members of an organization be encouraged to raise their concerns with their management as a preferred first course of action. Confidentiality must be guaranteed, and unless it is absolute, within in the constraints imposed by law, the reporting program will quickly lose credibility and the confidence of employees. Legal constraints on confidentiality should be communicated to a prospective reporter.

However, where that is not possible because, for example, management is part of the problem by being involved or knowingly tolerates the wrongdoing, a confidential reporting mechanism should be available whereby members of the organization can raise their concerns about their immediate management without that person's involvement or knowledge.

Where individuals feel seriously threatened, or where offices have only a few employees, guarantees of confidentiality may not be enough to encourage reporting, in which case offering anonymity would be necessary. Anonymous reporting, however, renders proper investigation more difficult and lends itself more easily to abusive, malicious or frivolous use of the system.

In summary the Global Fund needs to consider all three these reporting avenues:

- Confidentially raising concerns with management or superiors (internal reporting mechanism);
- Confidential reporting bypassing immediate reporting lines (internal reporting mechanism); and
- Anonymous reporting (external, outsourced reporting mechanism).

6.   Screening

The reporting line should provide safeguards against frivolous or malicious reports.

Research shows that in certain parts of the world respondentd fear an avalanche of frivolous complaints, with employees using reporting channels to complain about hurt feelings or bad coffee, clogging the system and wasting management time.

However, research largely dispels concerns about trivial reports. Very few frivolous or trivial claims are received. On the whole, employees tend to fear that their concerns are too vague and speculative to report and much information is probably lost as a result. In these cases,

employees should be encouraged to provide the information they have, and to describe whether it is based in fact or speculation. They should be assured that real schemes are often uncovered because there are multiple reports that, taken together, provide a more complete picture.

A greater concern is that a reporting program will be used to make malicious, false reports. Investigating and determining whether a complaint is malicious and baseless may expend considerable resources.

In respect of malicious, false reports, the following steps are important and should be considered by the Global Fund:

- Maintain the confidentiality of the investigation to ensure that the reputation of the investigated person is not damaged;
- Reports made by those who know them to be false should carry penalties, but care should be taken not to deter reporters who recount details with a good-faith belief in their accuracy;
- Penalties might include a letter to the employee's file the first time, with notice that a second abuse of the system could result in sanctions, including termination; and
- It should be made clear to employees that deliberate false reports may carry penalties if they amount to slander or libel.

7.   Collect data

Monitor reports, track them over time, identify vulnerabilities, and take corrective action.

Surprisingly, many companies with carefully designed and implemented programs do not collate the information gathered to track patterns and trends. One needs to measure to manage, thus data collection should assist with identifying risk areas and setting in motion action plans to address them proactively. Such a management strategy lends credibility to the reporting program.

8.   Remedial action and feedback

Take action and provide feedback to the reporter as appropriate.

If it appears that no action is taken in response to reports of wrongdoing, the reporting mechanism will be thought hollow and meaningless and the flow of information will likely stop.

A crucial way to retain employee confidence in the process is to let the reporter learn the outcome when that is appropriate and can be balanced with the interests of all parties. It may be prudent to issue reports with names removed organization-wide to demonstrate that the system is working.

In addition, these reports can be a valuable training tool providing employees with examples of appropriate use of the system.

9.   Management visibility

Report to the audit committee or board of directors, when appropriate.

Each board or audit committee must determine how much information it requires to assess the extent of compliance failures and must further determine how often it should be provided, how the information should be organized, and who should make threshold decisions sorting frivolous reports from those about which they should be informed. In some countries, this will be governed by law. Where it is not, research shows that organizations recommend erring on the side of information, especially in the early years of a new reporting system, since the overseeing body might find its assumptions tested by surprising patterns.

10.   Reporter protection

Protect reporting employees both during employment and after departure from the organization.

From the perspective of the reporter, this is the most important part of an internal reporting mechanism. No employee should have to risk livelihood, professional future, health or security to report wrongdoing.

In practice, many feel extremely conflicted about taking action, especially in countries where feelings of loyalty to immediate colleagues are seen as taking precedence over the far more abstract concept of loyalty to the organization and its stakeholders. Some organizations recognize the need to provide psychological counseling in addition to professional career advice and support.

Most reporting programs include a non-retaliation provision designed to assure employees that their jobs will remain secure and their identities unknown. Still, research shows that in some extreme instances, employees faced outright intimidation precluding all but the bravest from acting.

Organizations may need to implement a follow-up mechanism to track the progress of employees for a period of time after they report serious wrongdoing, which amounts to monitoring and positively managing the reporting program to verify its effectiveness and possible shortcomings.

11.   External communications

Report to external stakeholders and other interested parties on actions taken and results achieved.

The primary goal of internal reporting mechanisms is early awareness of problems in order to manage ethical risk. By knowing first, management can protect the organization from needless reputational damage and allocate resources for remedial action. This enables organizations not only to do the right thing, but to be seen to do the right thing.

One way in which organizations communicate these steps to primary stakeholders and other interested parties is through periodic reports addressing problems uncovered and solutions implemented.

C.   Challenges

Research shows that even well-designed programs sometimes fail because the implementers are unable to dispel suspicion of management's "true motives" or to provide adequate assurances that those who report problems will not be ignored, silenced or punished for bearing bad news.

Research shows that internal reporting mechanisms will work if they are embedded in a company culture dedicated to transparency. Reporting systems will fail, or they will merely induce deeper cynicism, if they are perceived as mere window-dressing, or worse, devices deployed by untrustworthy management to flush out dissenters.

Organizations with reporting programs reported the following five concerns, regardless of size or location:

1.	**Management apathy or resistance**

Programs will fail if management does not provide support, both through frequent and high-level public statements and through the commitment of staff and resources. In addition, mid-level management must find the balance between supporting the program and impeding access with too much involvement. Too much management control over the process is likely to prevent its use.

Doubts about management commitment can also arise if the reporting mechanism is housed in one part of the organization, the law department for example, without any cooperation with other parts, including human resources, the most senior management and the board.

Many organizations make their internal reporting system available to staff who may wish to use it, but do not positively encourage its use. Only a very few seek to instill a sense of obligation by sending the message that staff who become aware of wrongdoing yet fail to sound the alarm are complicit by their apathy or indifference.

2.	**Cultural and historical obstacles**

Research shows that the overwhelming majority of respondents based outside the US, UK and Australia expressed deep-seated concerns about promoting what they characterized as a "culture of denunciation".

On the one hand, there was a general willingness to foster a culture grounded in strong ethical values, and recently, this has been given added impetus by the trauma of highly-public corruption scandals.

On the other hand, the idea of positively promoting the use of an internal reporting system was very often seen as a step too far — and this despite acknowledging that internal reports had often played a vital role in averting further scandal. Research shows that in many countries the business community was not ready to embrace internal reporting mechanisms.

This aversion to enlisting staff in an organization's effort to detect wrongdoing has deep historical roots. Yet, despite collaboration during World War II and the experiences of "Big Brother" in formerly communist Eastern Europe, the idea is beginning to gain broader acceptance. In addition, any effort to extend a reporting program to the developing world would need to take account of cultural particularities and sensitivities.

3.	**Union relations**

In many countries lacking a tradition of internal reporting, that role has been partially filled by trade unions, at least insofar as employment violations are concerned. Cooperation with trade unions can be critical to the successful take-up of an internal reporting mechanism, particularly in companies with a tradition of active consultation, and where staff resistance is likely to be strong. This cooperation must begin at the earliest stages of the creation of the

program and must continue throughout the implementation and revision of its operation. Such close cooperation can help overcome concerns about management motives and also can help communicate the right message for the appropriate use of the program.

4.   Employee suspicion or fear

Reporters making use of anonymous reporting mechanisms to register legitimate concerns are in all likelihood motivated in part by fear — fear of being ostracized, fear for their jobs, their future, even their safety. Some expressed fear that retaliation would be subtle, taking the form of less favorable performance reports or loss of promotion. Others believed that they could not protect their families if their identity became known.

Assurance of the protection and safety of reporters is necessary for the effectiveness of a reporting program.

In some countries, organizations operating internationally should not underestimate the very grave risk to personal safety for some employees when reporting. The death of the Indian engineer, Satyendra Dubey, who reported incidents of corruption on a $2 billion highway project directly to the Prime Minister's office, but whose identity was not protected despite his request, should serve as a serious caution.

5.   Escape hatch

Challenges arise when the person reporting the wrongdoing took part in it as well.

Research shows that few people who made reports have entirely clean hands. Often the employee participated in the early stages of a scheme, then reached a point when he/she felt the behavior must stop. About half of respondents concluded that the reporter should be granted an amnesty because the organization obtained the information needed to correct the situation. Others argued that the program ought not to be used as an escape hatch for an employee simply seeking protection from the consequences of his/her improper actions.

If amnesty is promised in advance, wrongdoers may come forward, although they may never tell all they know. If prosecution is threatened, silence and the hope never to be discovered may seem the best course.

There was general consensus that it makes sense to hold out the possibility of amnesty, but in each instance to let the seriousness of the offense shape the disposition of the case.

D.   Conclusion

The components of a robust whistle-blowing or reporting program (B above), and challenges for such a program (C above), should be considered when developing a policy.

The Global Fund would need to make some specific policy choices. Above all, the challenge is to understand, communicate and promote the program as part of an imperative to build an *ethical culture*. This challenge requires demonstrated ethical leadership.

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