

## GLOBAL COMPLIANCE SUMMARY OF PORTUGUESE WHISTLEBLOWING SCHEME GUIDELINES

On September 21, 2009, the Portuguese Data Protection Authority (CNPD) issued a new decision concerning the use of whistleblowing schemes as part of corporate governance practices. In conformance with the decision, the CNPD issued new guidelines on October 1, 2009. Based on our discussions with counsel in Portugal, the new guidelines expressly prohibit the anonymous reporting of allegations. However, while prohibiting anonymous reporting, the guidelines, in commentary, also indicate that the CNPD's intention is to provide guidelines that protect privacy while being compliant with the CNPD's understanding on the corporate governance rules of the Sarbanes Oxley Act of 2001 (SOX) – which requires the option of anonymous reporting.

Given the conflict in the express directives of the guidelines and the stated intent, we have spoken with privacy counsel in Portugal and are arranging for a meeting with the CNPD to seek clarification and offer alternatives similar to those used with other EU member states that only allow anonymous whistleblowing as a last resort. We will update you as we work with Portuguese counsel and the CNPD.

The new guidelines align Portugal with Spain as the only two EU countries completely prohibiting anonymous reporting. The most recent guidance from the Spanish Data Protection Agency, (Agencia Espanola de Proteccion de Datos (AEPD)), is that they are not going to revise their previous decision of June 2007. As with the new Portugal guidelines, Spain's refusal to allow anonymous reporting puts its privacy regulations in contradiction to SOX requirements. To read an English translation of the Spanish decision (Agencia Espanola de Proteccion de Datos (AEPD), Organic Law 15/1999, Opinion 1/2006), you may refer to Global Compliance's unofficial translation at:

<http://www.globalcompliance.com/pdf/spanish-whistleblowing-scheme-opinion.pdf>. Global Compliance continues to talk with data privacy counsel and authorities in Spain and we will contact you when we have further guidance.

The key elements of the new Portuguese guidelines are:

- **No Anonymous Reports.** Anonymous whistleblower reports are not allowed, though a reporter must be promised and receive confidentiality.
- **Limited Use.** Whistleblower reporting should preferably be used only when other normal reporting procedures are not suitable.
- **Reporting Categories.** Reporting categories are limited to SOX-type allegations (corruption, banking and financial crime, accounting and anti-bribery) which may only be lodged against people in managerial positions. Reporting is not allowed for breaches of general codes of conduct.
- **Authorization Requirements.** Companies seeking to implement a whistleblower scheme must obtain the CNPD's prior authorization – failure to do so can lead to fines of up to €5,000 for an individual or up to €30,000 for a company. In addition to seeking prior authorization to implement a whistleblower scheme, companies must also seek prior approval to transfer data outside of the EU (including transfers to the US).
- **Limits on Data Use.** Data processing is limited to (a) the whistleblower's identity and professional category; (b) the reported person's identity and professional category; (c) names and positions of the people involved in collecting and processing data; (d) allegations; (e) facts collected during the investigation of the allegations; and (f) disposition of the case.

We are attaching a list of questions and answers based on our current understanding of the issues. These are general guidelines and are not meant as legal advice. Please consult with your own legal counsel to decide on appropriate compliance actions for your organization.