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Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

Via email: whistleblower.policy@asic.gov.au

Attention: Andivina Uy
Senior Adviser, Strategic Policy

Greg Hackett
Senior Manager, Office of the Whistleblower

Dear Andivina and Greg,

RE: Consultation Paper 321 Whistleblower policies

Thank you for the opportunity to comment on the draft regulatory guide, RG 000 *Whistleblower policies*. 360Certainty is a Governance, Risk & Compliance advisory firm and welcomes the increased protections afforded to whistleblowers, as they are critical to uncovering misconduct and ideally preventing it from occurring.

In general, the proposed guidance as contained in RG 000 *Whistleblower policies* is well drafted and will provide relevant entities with sufficient regulatory guidance, subject to our comments below. In response to the specific questions, our responses are as follows:

BIQ1: Yes, we agree with the proposed guidance, subject to the following comments:

- RG 000.38-44: whilst reference is made in the note to RG 000.39 to the definition of “misconduct” in s9 of the *Corporations Act*, the definition of that term in the Terms of Reference for the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry extended to conduct that “breaches a professional standard or a recognised and widely adopted benchmark for conduct”. In assisting entities to contemplate what may constitute an “improper state of affairs or circumstances”, it may be useful to refer to this definition of misconduct too.
- RG 000.71: in the scenario that a whistleblower is considering a public interest or emergency disclosure, it would seem unlikely that they would consider contacting the entity’s whistleblower protection officer, as they are presumably facing a dire situation with respect to that entity. Accordingly, it is recommended that this paragraph be

amended such that it is suggested a discloser should contact an independent legal adviser.

- RG 000.73: it is recommended that a role be included with responsibility for ensuring officers and employees are adequately trained on the whistleblower policy, as is contemplated by RG 000.144-164. This could be part of the role articulated in (h) of this paragraph.
- RG 000.144: the example frequency of once a quarter for the providing of updates to a discloser of the progress of an investigation seems perhaps at odds with the immediacy and promptness recommended in RG 000.185. Accordingly, it would seem more appropriate for the example to be either fortnightly or at least monthly updates. In addition, a discloser should be provided the details of the person whom they can contact to obtain an update.
- RG 000.155: it is recommended that the training should also be provided to officers of the entity, not only its employees.
- RG 000.165: it is not clear if this paragraph is intended to be good practice guidance only, or if it is intended to be a mandatory requirement. It is recommended that for clarity, this is stated to be good practice guidance only.
- RG 000.170-174: these paragraphs allude to the keeping of a register of whistleblower disclosures, but do not explicitly recommend the keeping of such a register as a matter of good practice. We recommend that the utility of a register is made explicit immediately preceding these paragraphs, perhaps also listing the recommended fields.
- RG 000.171: an additional item that could be included is the timeframe between the date when the misconduct first occurred and the date the whistleblower disclosure was raised. Such statistics would be informative as to the reporting culture within the entity.
- RG 000.178-182: we recommend that the review of the whistleblower policy and its operation should be conducted by an independent person (similar to the requirements regarding independent reviews of an AML/CTF Program).

BIQ2: Yes, we agree that the information that must be covered by a whistleblower policy, as set out in s1317A(5), has been adequately addressed in the proposed guidance.

BIQ3: Yes, we agree that the matters included in the proposed guidance will be useful in helping entities to establish, implement and maintain a robust and clear whistleblower policy.

BIQ4: Yes, we agree that focus should be placed on disclosures of information that qualify for protection, rather than reports about all issues and concerns, and that as indicated in RG 000.49 and RG 000.55, a whistleblower policy should direct its users to the appropriate avenues for raising those matters not subject to the whistleblower protections. We recommend that where those other avenues are comprehensively dealt with in one or more other policies of the entity, reference to those policies in the whistleblower policy should be sufficient, without the whistleblower policy itself containing information on how to raise those grievances or otherwise resolve them, as is perhaps currently contemplated by RG 000.55. If such information were included in both another policy and the whistleblower policy, there is risk that over time inconsistent

information may arise. In addition, a whistleblower policy that also contains such information will be a lengthier document, more prone to losing its focus and best communicating to its users the specific aspects relating to whistleblowing.

BIQ5: Yes, we agree with the proposed guidance that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity.

BIQ6: Yes, the proposed good practice guidance useful and appropriate, subject to the items noted in response to BIQ1.

BIQ7: Yes, we agree with the proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false reporting, and more so agree that this needs to be carefully balanced so as not to discourage reporting.

BIQ8: Yes, we agree that smaller entities should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures.

BIQ9: Please see above our response to BIQ1.

BIQ10: We do not foresee any practical problems other than as noted in our response to BIQ1.

B2Q1: Yes, we agree with the proposed additional good practice guidance in Section C of draft RG 000.

B2Q2: We make the following suggestion for improvement of this good practice guidance:

- RG 000.193: additional items to consider for these recommendations would be to provide a one or two page summary of the policy, as well as providing the policy in languages other than English if the entity's workforce has a significant proportion on non-English speaking workers, or those for whom English is a second language.

B2Q3: We do not foresee any practical problems with this Section C.

CIQ1: No, as we understand the contemplated exemption, this would only exempt not-for-profits and charities from the need to establish and operate a whistleblower policy, not from the other obligations and protections under Part 9.4AAA. Accordingly, we believe that the requirement to establish and operate a whistleblowing policy will better enable the officers, employees and volunteers of not-for-profits and charities to be aware of their obligations and their rights with regard to whistleblowers, which apply regardless of the contemplated exemption.

CIQ2: Not applicable.

If you require any clarification on the comments made above, please do not hesitate to contact the author on [...](#) or [....](#)

Yours sincerely,



Tom O'Callaghan

Managing Director and Chief Executive Officer