

## GLOBAL CONVENTION 2011

# **Whistleblower ... an important player in detection and prevention of Corporate Fraud**

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A **whistleblower** (**whistle-blower** or **whistle blower**) is a person who tells the public or someone in authority about alleged dishonest or illegal activities (misconduct) occurring in a government department, a public or private organization, or a company. The alleged misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations, and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues).

Whistleblowers frequently face reprisal, sometimes at the hands of the organization or group which they have accused, sometimes from related organizations, and sometimes under law.

Ideas about whistleblowing vary widely. Whistleblowers are commonly seen as selfless martyrs for public interest & organizational accountability; others view them as "tattle tales" or "snitches," solely pursuing personal glory and fame.

It is probable that many people do not even consider blowing the whistle, not only because of fear of retaliation, but also because of fear of losing their relationships at work and outside work.

*Persecution of whistleblowers* has become a serious issue in many parts of the world. Although whistleblowers are often protected under law from employer retaliation, there have been many cases where punishment for whistleblowing has occurred, such as termination, suspension, demotion, wage garnishment, and/or harsh mistreatment by other employees. For example, in the United States, most whistleblower protection laws provide for limited "make whole" remedies or damages for employment losses if whistleblower retaliation is proven. However, many whistleblowers report there exists a widespread "shoot the messenger" mentality by corporations or government agencies accused of misconduct and in some cases whistleblowers have been subjected to criminal prosecution in reprisal for reporting wrongdoing.

Depending on the circumstances, it is not uncommon for whistleblowers to be ostracized by their co-workers, discriminated against by future potential employers, or even fired from their organization. This campaign directed at whistleblowers with the goal of eliminating them from the organization is referred to as mobbing. It is an extreme form of workplace bullying wherein the group is set against the targeted individual.

Legal protection for whistleblowing varies from country to country and may depend on any of the country of the original activity, where and how secrets were revealed, and how they eventually became published or publicized.

## **USA**

In the United States' Sarbanes–Oxley Act was enacted on July 30, 2002 for corporate fraud whistleblowers.

At Wall Street, under The Dodd-Frank Act a new SEC whistleblower program has been created which provides a significant financial incentive for individuals to report possible violations of federal securities laws by public companies. This provision authorizes the SEC to award "bounties" to any individual who provides original information to the SEC resulting in significant monetary sanctions. In addition, the act created a new cause of action for those employees who are subject to retaliation for having provided the SEC with information about suspected violations.

Under the final rules, a "whistleblower" is an individual who provides the SEC with information that relates to a "possible violation" of federal securities law that has occurred, is ongoing, or is about to occur.

The SEC adopted these final rules on May 25, 2011 by a 3-2 vote after having considered more than 1,500 comment letters submitted in response to proposed rules published in November 2010. The final rules will become effective 60 days after the rules are published in the Federal Register.

In order to be eligible for an award under the program, the whistleblower must voluntarily provide the SEC with "original information" of a possible violation of federal securities law, which information leads to the successful enforcement action by the SEC, resulting in monetary sanctions totaling more than \$1 million. Qualified whistleblowers may be eligible for an award of 10-30% of any monetary sanctions resulting from the SEC enforcement action or any related action.

## **UK**

In the United Kingdom, the Public Interest Disclosure Act 1998 provides a framework of legal protection for individuals who disclose information so as to expose malpractice and matters of similar concern. In the vernacular, it protects whistleblowers from victimization and dismissal.

## **Canada**

Canada's parliament has instituted the Public Sector Integrity Office (Canada), a parliamentary office for the protection for whistleblowers who speak up against abuses in government.

## **India**

In 2010 Govt of India enacted a Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010, also known as Whistleblowers act. The Govt of India is in discussions with a group

of Civil Society representatives led by social activist Mr. Anna Hazare for enacting strong Lok Janpal legislation against corruption.

### **Mauritius**

The Govt of Mauritius has established an office of **Ombudsman** and is one of the most comprehensive legislation enacted on the subject in the world.

The role of the **Ombudsman** is to investigate into complaints against Government Institutions and seek redress to injustice if any, sustained in consequence of any alleged maladministration that may have been committed by any public officer or authority in the exercise of administrative functions. The Ombudsman looks into complaints made by members of the public; when he is invited to do so by any Minister or other member of the Assembly; or if he considers it desirable to do so of his own initiative.

### **Country wide List of Comprehensive National Laws – Whistleblowers/ Others**

A brief look at provisions enacted in various countries under different names is given hereunder:

Canada-Public Servants Disclosure Protection Act

Japan -Whistleblower Protection Act

New Zealand -Protected Disclosures Act

Romania -Act on the Protection of Whistleblowers

South Africa -Protected Disclosures Act

United Kingdom -Public Interest Disclosure Act

United States -Whistleblower Protection Act

Antigua and Barbuda -Freedom of Information Act, 2004

Australia -Public Services Act 1999

Canada -Criminal Code

Croatia -Law on Civil Servants

Georgia -Law on Freedom of Speech and Expression

Hungary -Act IV of 1978 on Criminal Code

Iraq -Order 59 Protection and fair Incentives for Government

Whistleblowers 01 June 2004

Ireland -Standards in Public Office Act, 2001

Israel -State Comptroller Law (SCL)

Kenya Anti-Corruption and Economic Crimes Act, 2003

South Korea Anti-Corruption Act

Macedonia -Law on Free Access to Information of Public Character

Malawi -The Corrupt Practices Act, 1995

Mauritius -The Prevention of Corruption Act 2002

Moldova -Law on Access to Information

Montenegro -Law on Free Access to Information  
Nepal -The Prevention of Corruption Act, 2059 (2002 A.D)  
Netherlands -Civil Servants Act  
Norway -Working Environment Act  
Sierra Leone -Anti-Corruption Act 2000  
Slovakia -Labour Code  
Slovenia -Code of Conduct of Public Employees  
Sweden -Freedom of Press Act  
Uganda -Access to Information Act 2005  
United States- Sarbanes-Oxley Act

## **Whistle Blowers and Corporate Fraud Prevention – a way forward in Indian Corporate Context \*\***

There is an urgent need for a relook at the whistleblower provisions as well corporate reporting parameters. The main suggestions were as under:

1. Protecting a whistleblower / strict rules to ensure hiding the identity of the whistleblower.
2. Establishment of a **Corporate Fraud Meter** for all listed companies based on the number of whistleblower complaints received during the year, complaints settled and outstanding complaints at the end of the financial year. Annual Financial Report should include a statement by the Board of Directors to assure the shareholders in a transparent manner on the risks related to Corporate Fraud in the company.
3. This will in turn be used as a **Corporate Fraud Benchmark** – for all listed companies as a clear ranking of various companies on Corporate Fraud Barometer. This may also reflect in the equity share prices as well as equity valuations of listed companies.
4. Also recommended was the establishment of a concept of **Corporate Lokpal** in every listed company. This could be by enhancement of Chief Vigilance Officer in the company or by strengthening the post of Company Secretary in the company. The **Corporate Lokpal** will report directly to the **Shareholders at the AGM.**
5. The process of recording of the complaint by the whistleblower needs to be technically improved and use of **independent Ethics Line providers maybe outside India** can be considered. Also new technologies like **Video Mail** by using the mobile phones will also be a revolutionary step in this regard.

**\*\* Ref Presentation on Whistle Blowers role in detection and prevention of Corporate Frauds by Sunil Bahriat 5<sup>th</sup> Annual Antifraud Conference organized by Riskpro India Hyatt –Mumbai, India – 17<sup>th</sup> June 2011**