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WHISTLEBLOWING: RECENT DEVELOPMENTS AND IMPLEMENTATION ISSUES

Foreword

Mak Yuen Teen has raised some very important considerations for the internal governance of corporations when he argues for additional legal protections for whistleblowers.

Boards of Directors should respond positively and constructively to his suggestions because his arguments go to the heart of board powers and responsibilities.

Whistleblowing occurs when there is bad news to report; news so unsettling that it is feared and covered up. That is why it often takes a “whistleblower” to bring the unsavory tidings to public attention. Normal channels for reporting and disclosure have failed.

In short, the information that is to be conveyed to responsible authorities by whistleblowers points to dangers and risks, sometimes grave dangers and high risks. One thinks of Sharon Watkins at Enron seeking to inform the CEO Ken Lay of systemic financial misreporting of actual earned income. What had been covered up and what she sought to disclose was of life and death consequence to the company. Public disclosure of her information led directly to Enron's bankruptcy. Suffice to say a more responsible board should have prevented that event by taking early preventive action.

Boards no doubt need to know the information upsetting whistleblowers as soon as possible in order to minimize consequent risks to the corporation. With this tactical truth in mind, Boards should create cultures within the company that encourage early transparent reactions to bad news, fraud, manipulations, and abuses of power. Whistleblowers should not be discouraged as Prof. Mak points out.

Mak's essay raises a second issue of fundamental importance for boards: to whom does employee loyalty run? Is it to supervisors and superiors or to the company itself? The law is clear and practice different. The law holds that an agent's duty of loyalty is to the principal who hired the employee. That is the company as an entity and also the owners of the company who bear the risk of loss from operations. But practice centered as it must on human nature often puts the individual supervisor ahead of the best interests of the company. Employees work in

a political setting where pleasing those with the power to reward or punish takes on most importance for career success.

Since the board is not in the company's managerial chain of command, it has more freedom to step in and reinforce the legal norm of loyalty to the company first. If individuals fail in their duties to the company, then such misfeasance or nonfeasance must be reported properly and dealt with. It is of the essence of a board's responsibility to insure the faithful execution of duty by the company's employees. This is true even in family owned companies where boards are more likely to play something of an advisory role to senior family members. The best advice a board can give in these circumstances is to move the company culture towards responsibility and active loyalty to the common good.

Finally, Prof. Mak tables the issue of culture—both within an enterprise and in the society that produces the human capital used by the company. Some societies we know do not encourage public disclosure of bad news or embarrassing developments. “Saving face” as some refer to it carries high social value. Building efficient business operations in such cultures is a special challenge for boards and senior executives. They tend to benefit more than others from the cultural drift towards “saving face” and covering up mistakes. Thus, they must work all the more vigorously to set in place norms and practices that define virtuous conduct by its fidelity to achievement, transparency and accountability.

Prof. Mak's thoughtful essay is important reading.

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WHISTLEBLOWING: RECENT DEVELOPMENTS AND IMPLEMENTATION ISSUES

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Introduction

A 2004 study by the Association of Certified Fraud Examiners (ACFE) of U.S. organizations reported that organizations without proper mechanisms for reporting fraud and unethical behavior suffered fraud-related losses that were almost twice as high as those with such mechanisms. It also found that about **40% of frauds are initially detected through whistleblowing**, compared to 24% for internal audits, 21% by accident, 18% through internal controls, and 11% through internal audits.

Despite the fact that employees who blow the whistle play a key role in detecting and preventing fraud, thereby protecting the interest of the organizations they work for, they often face adverse consequences. A study of 233 whistleblowers in a hospital in the U.S. reported that **"90 percent of the whistleblowers were fired or demoted**, 27 percent were sued, 26 percent had to seek psychiatric or physical care, 25 percent suffered alcohol abuse, 17 percent lost their homes, 15 percent got divorced, 10 percent attempted suicide, and 8 percent were bankrupted."

¹

These studies show that **while whistleblowing is an important component of the corporate governance system of an organization, whistleblowers often face persecution**. In this article, I review legislation that has been introduced to protect whistleblowers in a number of countries. I also discuss the importance of the right corporate culture and attitudes towards whistleblowing, which are arguably just as important as legislation protecting whistleblowers. I then discuss two real-life case studies on whistleblowing and conclude with key implementation issues which should be considered in developing a whistleblowing policy.²

¹ Peter Rost, "The Whistleblower: Confessions of a Healthcare Hitman," Soft Skull Press, NY, 2006.

² I use the term "whistleblowing policy" to cover the entire whistleblowing framework within an organization, including the documented policy itself and the procedures for implementing the policy.

Legislation protecting whistleblowers

Developed countries such as the U.S., U.K. and Australia have introduced legislation relating to whistleblowing. In the U.S., the Sarbanes-Oxley Act 2002 requires the audit committee to establish rules for (1) the treatment of complaints received by the company regarding accounting, internal accounting controls or auditing matters, and (2) the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters. It also contains civil provisions that protect whistleblowers employed by publicly traded companies from discrimination, and criminal provisions prohibiting retaliation against employees of both public and private companies who whistle-blow to a law enforcement officer.

In the U.K., the Public Interest Disclosure Act (1998) provides protection for employees in the public, private and voluntary sectors for a broad range of disclosures. Qualifying disclosures are disclosures of information which the employee reasonably believes tends to show one or more of the following is either happening now, has happened in the past, or is likely to happen in the future.

- a criminal offence
- a breach of a legal obligation
- a miscarriage of justice
- a danger to the health or safety of any individual
- damage to the environment
- deliberate covering up of information which tends to any of the above

Disclosures which are protected include those made to the employer or through internal procedures, a prescribed person as defined under the legislation, a legal adviser or a Minister.

Australia recently amended its Corporations Act to provide protection to officers, employees, and contractors and their employees. The Act provides protection against any retaliation against a whistleblower and gives them a civil right, including the right to seek reinstatement of employment. It also provides qualified privilege against defamation and precludes contractual or other remedies being enforced including civil and criminal liability for making the disclosure. Secrecy provisions in any employment will not preclude whistleblowing. Disclosures which are covered include those made to the securities regulator; the company's auditor or a member of the audit team; a director, company secretary or senior manager of the company; and any other person authorized by the company to receive revelations of this kind. Interestingly, whistleblowers must give their name before making the disclosure in order to receive protection under the Act.

Often, legislation requires that disclosures be made in good faith and with reasonable belief to receive protection. For example, the Australian Corporations Act requires that the person making the disclosure has reasonable grounds to suspect that their revelation indicates the company or an officer or employee has breached corporate legislation and to act in good faith. It states that where a person has a “malicious or secondary purpose in making a disclosure”, the good faith requirement would not be met.

More limited whistleblowing provisions have also been introduced in some countries. For example, Malaysia amended its securities legislation to protect certain persons—the chief executive officer, company secretary, internal auditor and chief financial officer—who report securities-related offences to the authorities. The protection against retaliation includes protection against discharge, discrimination, demotion and suspension. It also amended its securities legislation to make it mandatory for auditors to report to the relevant authorities, breaches of securities laws and listing requirements. This is an extension of existing requirements in the Malaysian Companies Act imposing a similar duty on auditors to report to the relevant authorities, breaches of company law. Under the Singapore Companies Act, an auditor has a mandatory duty to report to the authorities if he has reason to believe that a serious offence involving fraud or dishonesty is being or has been committed against the company by officers or employees of the company.

It is fair to say that outside of the more developed countries like U.S., U.K. and Australia, there is limited legislative protection for whistleblowers. **The lack of legislative protection is often compounded by the employment law, libel law and the general legal system.** For example, employment laws in some countries make it relatively easy for an employer to fire an employee, with limited notice and without proper cause. The costs of taking civil action for wrongful dismissal and the lack of punitive damages even if wrongful dismissal is proven means that it is unlikely that an employee who is fired for whistleblowing will take any legal action. The company and its management have the full resources of the company to defend the suit, while the employee has limited resources and may have to pay costs if he loses. A whistleblower may also be sued for defamation and may have to pay up if the allegation turns out to be incorrect, even if made in good faith and with reasonable belief. In any case, the whistleblower usually has limited resources to contest such a lawsuit. Further, it may not be possible to protect the identity of the whistleblower if the plaintiff applies to the Court for his identity to be revealed.

Some countries are reluctant to introduce legislation to protect whistleblowers because of concerns about the wider implications of such legislation. For example, in Singapore, the issue of introducing legislation to protect whistleblowers was considered by the government. It was rejected and some of the grounds which have been

cited by the government and commentators include concerns about raising the costs of doing business and the implications of such legislation for employment and libel laws.

In addition to legislation, various **codes of corporate governance include recommendations to put in place whistleblowing arrangements**. For example, the revised Singapore Corporate Governance Code (2005) recommends that “The AC [audit committee] should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The AC’s objective should be to ensure that arrangements are in place for the independent investigation of such matters and for appropriate follow up action.”

My personal view is that legislation to protect whistleblowers is necessary to encourage more “good faith” whistleblowing. However, **legislation by itself is not sufficient**.

Culture and whistleblowing

Perhaps as important, or **even more important, than legislation protecting whistleblowers, is the existence of a culture that is conducive to whistleblowing**. Legislation affords some level of protection, but the reality is that the protection is imperfect. There are many ways that a superior can take subtle reprisal actions against a whistleblower without resorting to blatant harassment, termination, and the like. This can include changing the job scope of the employee to create a mis-fit between the employee and the job, slowing promotions or denying salary increases on grounds of performance, etc.

Obviously, the culture within an organization is important. An organization which is very hierarchical and top down, which does not have a culture of allowing employees to express dissenting opinions, or is not seen to take feedback or suggestions seriously, is unlikely to be successful in effectively implementing a whistleblower policy. Beyond the organizational culture, there is also the wider corporate culture—and indeed the societal culture as a whole—which may work strongly against employees coming forward. In some countries, the corporate community is extremely close-knit and if this community generally views whistleblowers in a negative light, a whistleblower risks not only losing his job within the organization, but also risks losing other employment opportunities.

Attitudes towards whistleblowing

Many companies and other organizations have adopted whistleblowing policies. However, support for whistleblowing among companies and organizations is by no means universal. For example, in the case of one company listed in Singapore, the

board did not support a recommendation by the special investigator to implement a formal whistleblowing policy despite the fact that it was caught in an accounting scandal: Its justification was that a whistleblower policy lowers staff morale, as indicated in the following excerpt from the public statement released by the board:

The board...notes that concerned staff members have in times past approached the board to discuss issues pertaining to other staff members. The board takes the view that in practice, a 'whistle blower' mechanism is already in place in the Company. The board considers that it is undesirable to implement a formal 'whistle blower' policy as such a policy will serve to weaken the esprit de corps amongst the staff.

Contrary to the above view, I believe that a carefully-developed whistleblowing policy, which encourages good faith reporting of serious misconduct and discourages frivolous complaints, creates greater trust in the organization by shareholders and other stakeholders.

There is also an attitude amongst some that whistleblowing is an act of disloyalty, especially if the complaint is made to an external source, such as a regulatory authority. Employees do owe a duty of loyalty to the organization. In most cases, loyalty to one's organization requires one to carry out the instructions of one's superior as, otherwise, organizations cannot function. Nevertheless, as the following quote indicates, an employee's duty of loyalty to the organization does not imply that the employee must always do what his superior or the organization asks him to do, nor does it imply that the employee is necessarily disloyal even if he reports illegal or improper actions outside the organization.

*For those who argue that employees owe strict loyalty to the company, whistleblowing seems to be an act of extreme disloyalty. It puts at risk the reputation of the firm. But this seems to be based on a narrow view of loyalty as if it demands that we do whatever the company or another individual believes to be in their best interest...**Loyalty cannot imply that we should not report the unethical conduct of others...** This may imply for an employee that he or she is most loyal when trying to prevent something that could lead to harm for customers, shareholders, or the general public. If there is no proper response internally, or if by the nature of the case, it is not possible to find an internal remedy, then it would seem ethically correct to blow the whistle. In fact, sometimes there can be a duty to do so. It would be obligatory for an employee to blow the whistle when the level of harm to others is serious, and the employee has clear evidence of the unethical practice that has led to this. This could, for example, be in terms of product safety or severe financial hardship for others.³*

³ Michael Walsh, "Whistleblowing: betrayal or public duty?" <http://www.erc.org.au.2004>.

Is an employee who reports to the authorities, workplace safety hazards, tax fraud or the use of pirated software by his organization disloyal? Reporting serious violations outside an organization may be justified *especially if there are inadequate internal avenues inside the organization* to stop these practices. In many cases, **senior management may be party to the violation, so internal reporting may not be a viable option**. Many organizations have grossly inadequate internal systems for employees to report illegal or improper actions, leaving employees little choice but to report outside. When done in good faith and with reasonable belief, whistleblowing—even outside the organization—may well be the ultimate act of loyalty to the organization.

Any director or senior management who receives a whistleblowing complaint would do well to focus on the message rather than on the messenger. A whistleblower may well be a disgruntled employee but that does not necessarily mean that what he or she is reporting is untrue. Of course, any report made by a disgruntled employee has to be treated with that extra bit of caution. However, as one of the two cases below and many other cases indicate, **senior management and directors often treat whistleblowers with apathy**, if not outright disdain.

There is also apathy and fear amongst those who may be in a position to blow the whistle. I believe that very few people will be prepared to do the right thing especially if it does not affect them directly. I believe that many are unlikely to whistleblow if they do not feel that they will be directly implicated for failing to report such misconduct. This is known as the **“bystanders’ syndrome”**—that is, **“if it does not hurt me directly, it’s none of my business.”** Even where a person may be directly implicated, the potential threat to his “rice bowl” may cause him to just resign quietly, without reporting the misconduct. The close-knit corporate community and the general distrust of whistleblowers mentioned above may make it very difficult not only for whistleblowers to remain in their current jobs, but to even find jobs in other companies.

Often, an individual will only blow the whistle when he has resigned or plans to resign—and even then, he may prefer to just resign quietly. The problem is that a whistleblower who is planning to resign, or who has already resigned, can easily be considered a “disaffected” staff member and casually dismissed. So, there is a “catch-22” situation. Employees are often only prepared to blow the whistle if they have resigned or are resigning. These employees are seen to be unhappy with the organization or its management, and may therefore have an “axe to grind”. Consequently, concerns they raise are sometimes not taken seriously.

A survey on whistleblowing

A recent survey of CPA Australia members in Hong Kong, Malaysia and Singapore conducted by CPA Australia and the Corporate Governance and Financial Reporting Centre (CGFRC) at the National University of Singapore provides compelling reasons for having a whistleblowing policy. **59 percent of respondents said that they would report misconduct without a whistleblowing policy, but if there is a whistleblowing policy in place, another 36 percent would report such misconduct.** 52 percent of respondents said that they would whistleblow to the regulatory authorities, which is higher percentage than those who will report to internal channels such as the chairman of the Audit Committee or a compliance officer. However, if there is a whistleblowing policy which designates an officer to which concerns can be raised, 52 percent said they would report to this designated officer—the same percentage as those who will report to the regulatory authorities. A report to a regulatory authority is likely to be much more damaging to an organization not only because of its reputational and financial impact, but also because this usually happens when the problem has escalated to a much larger scale.

The survey also reveals a lack of trust in the ability of organizations to protect the identity of whistleblowers, with 41 percent of the respondents believing that their anonymity will not be protected even if the whistleblowing policy says so.

Case studies

Let me relate two real-life situations involving whistleblowing and the very different responses of the board of directors of the two organizations concerned. Neither organization had a whistleblowing policy in place at the time of the incident.⁴

Case study 1

The first case deals with widespread intimidation and harassment of junior employees by certain senior managers, including the general manager (GM), in a division of a large organization. Some of the actions taken by management include sudden firing of staff who have been receiving good performance reviews, sudden transfers of staff, and withholding bonuses. This was often done after hastily convened enquiries for alleged breaches of conduct by employees, presided by the senior managers themselves. It was a case of senior management using such tactics as a means of ensuring that employees are totally loyal to them and not ask too many questions.

One of the senior staff in the division wrote a letter to the board chairman complaining about a number of alleged improper actions against staff, citing specific evidence, identifying himself in the letter. He warned about possible adverse consequences to the division, including litigation by affected parties, departures of valued staff, adverse media publicity, declining morale and, in the worse case, employees causing harm to themselves or to others. The employee did not receive a reply for several months.

The chairman eventually replied to the employee after an ex-employee wrote to him threatening legal action for improper dismissal. The chairman then directed the CEO to investigate the alleged problems in the division.

There were, however, problems with the chairman's response. The CEO had in fact played a major role in appointing the GM against whom the complaint was made. The GM was appointed despite ethical concerns having been previously raised to the CEO.

The CEO, in turn, directed the corporate HR department to conduct the investigations. Unfortunately, the HR employees who were charged with

⁴ The cases and situations described are real but certain descriptions concerning the organizations and individuals are disguised.

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conducting the investigations were relatively junior to the divisional management and were seen to be lacking in independence from divisional management because they had previously advised staff to "just accept management's decisions" when complaints were made.

Eventually, no apparent action was taken and the whistleblower was not told about the outcome of the investigations. Within just over a year after the appointment of the new GM against whom the complaints were made, more than half of the staff in that division had either resigned or been transferred elsewhere. Eventually, the GM resigned as did several other senior managers, but that was well after the damage had been done.

There are many lessons that can be learnt from this case, which was obviously badly handled. First, the board chairman should have responded to the whistleblowing complaint much quicker, rather than waiting several months to do so. The whistleblower could well have blown the whistle outside, such as to the media. What should a director do in this situation? Given a director's duty to act in the interests of the organization and his duty of care, it seems to me that directors have a responsibility for properly investigating complaints about acts that can potentially harm the organization if there are reasonable grounds to believe those complaints. What if some of the possible consequences which the whistleblower warned about actually occur? Finally, beyond their duties as fiduciaries, isn't there a moral duty for directors to take concerns about wrongdoing in the organization seriously, especially if enough evidence had been presented?

Second, the board did not keep the whistleblower informed about the outcome of the investigation. It gave the impression that it did not take the complaint seriously.

Third, there was no attempt to undertake a proper independent investigation, as both the CEO and the HR department were conflicted. The CEO had hired the GM in the face of ethical concerns and a finding against the GM would have led to questions about the CEO's judgment in appointing him. The HR department should not have investigated the complaints. Quite apart from its apparent subservience to the divisional management, it is not advisable for the department that is ultimately responsible for taking actions against managers and employees to be investigating complaints on its own.

Case study 2

This case started when a recently-resigned Head of the IT department of Company A contacted the board chairman with a complaint that the CEO and COO had used certain resources of Company A to do work for Company X. Company X had no relationship with Company A.

The board chairman immediately met the whistleblower to listen to her concerns. The whistleblower alleged that the CEO had told employees that Company X was a subsidiary of Company A. According to her, certain employees of Company A had been asked to leave work early on certain days to do a project for Company X. She had questioned the CEO and COO as to why the activities of Company X were not reported to the board in the Heads' reports if it was indeed a subsidiary of Company A. When she continued to ask questions, the CEO transferred her to a branch, and subsequently told her that there was not enough work in that branch. She had no choice but to resign. She then did a search of Company X at the registry of companies, and found that there were only two shareholders of Company X—the CEO and COO—and that the registered address of Company X was the residential address of the CEO.

The chairman made some preliminary enquiries, including talking to two employees who had allegedly done work for Company X. It was revealed that one employee left early on certain days to work on an IT project for a client of Company X, while the other employee had helped to keep the books for Company X. The chairman then discussed with the vice chairman and the audit committee chairman, and it was agreed to put the matter before the board.

On the day of the board meeting, the whistleblower sent a 32-page document consisting of the results of the company search, email exchanges with the CEO and COO, and other information.

The board then decided on the following courses of action:

1. A board-level investigation committee be formed to coordinate the investigation, recommend actions to the board, and implement actions approved by the board.
2. An accounting firm be engaged to conduct an independent investigation.
3. A “disaster recovery plan” be put in place, in the event that senior management had to leave.

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The investigation committee interviewed the CEO and COO the following day, and a consultant was on hold to assist in “disaster recovery” should the CEO and COO have to be suspended. In the end, the investigation committee decided to allow both officers to continue, pending the outcome of the investigations. The committee had to balance various considerations, including the potential disruption to the operations, the impact on morale of the organization, the risk of interference with the investigations, and the need to ensure that natural justice was accorded to the two officers.

The investigation by the accounting firm took about two weeks. Although the investigation committee included a board member who was a lawyer, the committee decided to obtain a second opinion on the alleged breaches and the courses of action available to Company A, given different scenarios.

Some of the major findings of the investigation included:

- Company X was a private company set up by the CEO and COO
- Company A's resources were used to do work for Company X
- Company X was held out as a subsidiary of Company A in the CEO's dealings with some potential clients of Company X
- The interest in Company X of both the CEO and COO were not disclosed, in contravention of the code of conduct of Company A
- There were other questionable management practices which the CEO and COO were party to

The accounting firm made a presentation to the board on its findings, and the board approved a list of questions that the investigation committee had prepared for the two officers to respond to. This was to ensure that the two officers were given an opportunity to defend themselves.

The board held a special meeting on receiving the replies of the two officers. It decided that the allegations were proven and that the misconduct by the officers was serious. The board unanimously agreed that the two officers had to leave. The board then requested that the board chairman and two other board members discuss the findings with the two officers and to convey the board's disappointment with their conduct and its loss of confidence in the officers. The two officers resigned.

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As Company A had suddenly lost its two most senior officers, two of the board members who had retired from full-time employment were appointed to oversee day-to-day management for a period of three months, while a search for a new CEO was conducted. The board chairman then informed the whistleblower about the outcome and the closure of the case.

There was a discussion within the board and the new CEO about re-hiring back the whistleblower, especially as a consultant engaged to assist the company to ensure continuity on the IT side had recommended that she be re-hired. However, some board members were uncomfortable, as were some employees when the subject was raised by the new CEO.

What are the lessons from this second case?

First, Company A would undoubtedly have benefited from having a proper whistleblowing policy and set of agreed procedures for investigating whistleblowing complaints. Without these, it was fortunate that the IT manager was courageous enough to ask questions and to raise her concerns with the board chairman, as there were no established procedures for doing so. The board had no procedures to follow and had to “make them up as it went along”.

Second, the whistleblower helped the organization avert what could have been a disastrous situation. Although the actual losses suffered by Company A at the time the complaint was raised were small, the whistleblower had helped Company A avoid what could have been more catastrophic consequences. Based on legal advice, there was a possibility of legal liability for Company A if Company X had failed to deliver on its contracts, as the CEO had held out Company X as a subsidiary of Company A in his dealings with potential clients of Company X. As he was the CEO, external parties would have been entitled to rely on his representation.

Third, it is important to keep an open mind when whistleblowing complaints are received. While it should not be mandatory for the identity of the whistleblower to be revealed for complaints to be treated seriously, there should be at least some evidence provided to substantiate the allegations. It is important that any investigation is handled delicately and that natural justice is accorded to the alleged wrongdoer. This means **ensuring that the investigation be kept as low key as possible and that it is done by an independent party**. The alleged wrongdoer should be also given an opportunity to respond to the findings of the investigation.

Fourth, in deciding on the appropriate courses of action if the allegations are proven, a number of factors must be considered and **the decision taken should be in the best interests of the organization**. This can be an extremely difficult decision. For example, while legally, Company A could have terminated the contracts of the two officers and sued them for costs of the investigation and to recover resources of Company A used, the board decided that the risk of a protracted legal and, possibly, public battle may not be in the best interests of the organization. This is especially so given that the violations, while clearly serious, did not clearly break any laws or involve outright fraud. The CEO was not a board member, so he did not breach fiduciary duties as a director. It was more a case of non-disclosure and serious conflict of interests, and arguably a breach of duty of loyalty as an officer and a breach of the terms of his employment contract. In such cases, it is easy for an outside observer to criticize the board for not taking stronger action against the officers, such as termination with claims for damages. However, a tougher approach may not have been in the best interests of the organization.

Fifth, **it is important to acknowledge the receipt of the complaint from the whistleblower**, provided of course it is not an anonymous complaint. The whistleblower should also be kept informed about the outcome of the investigations. This is not only a sensible gesture to the whistleblower, given the personal risk she is taking in blowing the whistle. It also helps discourage the whistleblower from reporting outside, such as to the media.

Sixth, it is difficult for many people to accept having a whistleblower as a colleague or an employee, even if the whistleblower has acted in the best interests of the organization, and acted in good faith and with reasonable belief. In this particular case, the whistleblower was spot-on in her allegations and it saved the organization from potentially catastrophic damage if it was left undiscovered. Even then, there were divided views about hiring back the whistleblower.

Implementation issues

To conclude this paper, I will summarize the key elements and issues that need to be addressed in implementing a whistleblowing policy.

1. **Building a culture of trust and openness.** For a whistleblowing policy to work, there must be a culture of trust and openness, coming from the very top. An organization which does not encourage or tolerate alternative viewpoints can never develop an effective whistleblowing policy.
2. **Methods and channels.** Methods of submission could include internal mail, complaint box, telephone, email or website, while the person to whom complaints should be submitted could include a designated officer, chairman of the audit

committee, internal audit, legal or compliance officer, or an external hotline managed by an independent outside organisation. Multiple methods and complaint channels can be provided, but the importance is that employees have trust in the integrity of these methods and the persons receiving the complaints.

3. **Anonymity versus non-anonymity.** Some organizations which have implemented whistleblowing policies specify that anonymous complaints will not be investigated. While there is a case for arguing that anonymous complaints are more likely to be frivolous, this fails to appreciate the real concerns faced by whistleblowers, including threat to their livelihood. The key is not the identity of the whistleblower but the seriousness of, and the evidence supporting, the allegation. Knowing the identity makes it easier to investigate complaints, so there is no harm in encouraging employees to reveal their identity while giving them the necessary assurances, but to disregard anonymous complaints is, in my opinion, inadvisable. As indicated earlier, many people do not believe in anonymity assurances given in a whistleblowing policy, so this is an issue that will need to be addressed.
4. **Improprieties which are covered.** There is a need to be clear about what are the types of improprieties that management and the board view as sufficiently serious. This will also help pre-empt frivolous complaints. Improprieties could potentially include accounting irregularities, theft, fraud, corruption/dishonesty, harassment, unethical behavior, improper conduct, workplace safety hazards, and breaches of legislation. A good place to do this is in the code of conduct, and a robust whistleblowing policy and comprehensive code of conduct go hand in hand. One thing that is important is not to be too narrow in specifying improprieties, for example, focusing purely on accounting irregularities and financial fraud. Improprieties that can cause serious harm to the organization may not be directly financial in nature, for example, breaches of safety standards or harassment of staff. The whistleblowing policy should also spell out consequences of frivolous complaints which have no basis.
5. **Investigation, follow up and reporting procedures.** Once a whistleblowing policy is in place, one should be prepared to receive complaints. Rather than having to “make it up as you go along” when a complaint arises, it is good practice to develop procedures for investigating complaints, following up, and reporting by the person charged for the investigation to management or the board, and also feedback to the whistleblower (if he or she is identified). The board, or an appropriate board committee, should be kept informed about investigations into all serious allegations.

6. **Types of prohibited reprisals.** The whistleblowing policy/code of conduct should specify prohibited reprisals against whistleblowers, such as discrimination, harassment, intimidation, demotion, and termination. It should also be clear that appropriate punishment will be meted out against those who take such reprisal actions.
7. **Policy regarding whistleblower's immunity from disciplinary proceedings and civil/defamation claims.** Finally, apart from the above reprisals, whistleblowers also face possible civil liability and disciplinary action especially if their complaints turn out to be wrong, even though they may have reported concerns in good faith and reasonable belief. A whistleblowing policy should, as best as possible, provide the necessary protection to employees under such circumstances.

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Prof. Mak was a member of the Council on Corporate Disclosure and Governance (CCDG) from 2002 – 2005 and was also a member of the Corporate Governance Committee which released the first Code of Corporate Governance. He is also a core member of the OECD/World Bank's Asian Corporate Governance Roundtable and was recently appointed to the Charity Council established by the Ministry of Community, Youth and Sports.

Prof. Mak is Vice Chairman of SATA, a Board Member of the new National Kidney Foundation, a Board Member of the Financial Industry Dispute Resolution Centre Ltd. and a member of the Audit Advisory Committee of the United Nations Population Fund based in New York.



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