

# A STEP-BY-STEP GUIDE TO BLOWING THE WHISTLE AND SURVIVING THE STORM THAT FOLLOWS

Corporate whistleblowers save lives, prevent fraud, and preserve the environment. But these results come through a long, difficult, draining, and often frightening process that leads many unprepared whistleblowers to give up. Fortunately, they now have the support they need. This unprecedented and authoritative guide covers every step of the process—finding information to support your claims, determining whom to blow the whistle to, dealing with attacks from opponents, enlisting allies, understanding the law, and more.

*Shows how to successfully blow the whistle. Offers experience and testimonials that are invaluable.*

Shelton Watkins, former Vice President

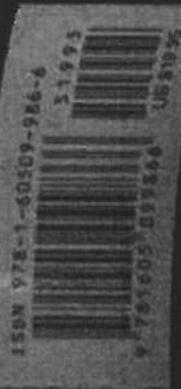
*A crucial guide... It will help whistleblowers understand the ramifications and making a decision.*

Sheryl Arvidson

*A person, a boss, and a life put to rest and survive the turbulent, dark, and painful waters.*

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A HANDBOOK FOR COMMITTING THE TRUTH

The CORPORATE

# WHISTLEBLOWER'S

# SURVIVAL GUIDE



TOM DEVINE and TAREK F. MAASSARANI

FOREWORD BY DR. JEFFREY WIGAND, SUBJECT OF THE MOVIE THE INSIDER

PUBLISHED IN ASSOCIATION WITH THE GOVERNMENT ACCOUNTABILITY PROJECT

THE

# CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE



# T O O L G

## International Best Practices for Whistleblower Policies

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation, thinking they had genuine protection when in reality there was no realistic chance that they could maintain their careers. In those instances acting on rights contained in whistleblower laws has meant the near certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. The Government Accountability Project's review of the track records for these and prior laws over the past three decades has revealed numerous lessons learned, which have steadily been solved on the federal level through amendments to correct mistakes and close loopholes.

GAP labels such token laws as "cardboard shields" because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as "metal shields," behind which an employee's career has a fighting chance. The following checklist of 20 requirements reflects GAP's 32 years of lessons learned. All the minimum concepts exist in various employee protection statutes currently on the books. This best-practice standard is based on a compilation of all national laws and intergovernmental organization policies such as those of the United Nations and the World Bank. It does not reference state or regional policies.

### Scope of Coverage

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free-expression rights extend to any relevant witness, regardless of audience, misconduct, or context, to protect them against any harassment that could have a chilling effect.

**Context for free-expression rights with no loopholes** Protected whistleblowing should cover *any* disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. There can be no loopholes for form, context, or audience, unless release of the information is specifically prohibited by statute or would incur organizational liability for breach of legally enforceable confidentiality commitments. In that circumstance disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. It is necessary to specify that disclosures in the course of job duties are protected because most retaliation is in response to "duty speech" by those whose institutional role is blowing the whistle as part of organizational checks and balances.

United Nations whistleblower policy (U.N. policy), § 4; OAS Model Law (approved November 2000) to implement Inter-American Convention against Corruption (OAS Model Law), §§ 2(d)-(f); Asian Development Bank Audit Manual, § 810.200; Public Interest Disclosure Act of 1998 (PIDA), c. 23 (U.K.), amending the Employment Rights Act of 1996, c.18, § 43(C); Protected Disclosures Act of 2000 (PDA); Act No. 26, GG21-453 of Aug. 7, 2000 (S. Afr.), § 7-8; Anti-Corruption Act of 2001 (A.C.A.) (Korea); statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 (Ghana WPA), § 4; Japan Whistleblower Protection Act, Article 3; Whistleblower Protection Act of 1989 (WPA) (U.S. federal government), 5 U.S.C. § 2302(b)(8); Consumer Product Safety Improvement Act (CPSIA) (U.S. corporate retail products), 15 U.S.C. § 2087(a); Federal Rail Safety Act (FRSA) (U.S. rail workers) 49 U.S.C. § 20109(a); National Transportation Security Systems Act (NTSSA) (U.S. public transportation), 6 U.S.C. § 1142(a); Sarbanes-Oxley Act of 2002 (SOX) (U.S. publicly traded corporations), 18 U.S.C. § 1514(a); Surface Transportation Assistance Act

(STAA) (U.S. corporate trucking industry), 49 U.S.C. § 31105(a); American Recovery and Reinvestment Act of 2009 (ARRA), (U.S. Stimulus Law), P.L. 111-5 § 1553(a)

**Subject matter for free-speech rights with no loopholes** Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, and any other activity that undermines the institution's mission to its stakeholders as well as any other information that assists in honoring those duties.

U.N. policy, § 2.1(a); OAS Model Law, Article 2(c); Inter-American Development Bank (IDB) Staff Rule 328 § 104; PIDA (U.K.); PIDA, § 1(i) (S. Afr.); ACA (Korea), Article 2; Public Service Act (PSA), Antigua and Barbuda Freedom of Information Act, § 47; R.S.O., ch. 47, § 28.13 (1990) (Can.); Ghana WPA, § 1; Uganda Whistleblower Protection Act of 2010 (Uganda 2010 WPA), § 1; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8); FRSA (U.S. rail workers), 49 U.S.C. § 20109(a)(1); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(a)(1); ARRA (U.S. Stimulus Law); P.L. 111-5 § 1553(A)(1)-(5)

**Right to refuse to violate the law** This provision is fundamental to stop faits accomplis and in some cases to prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines that the order would *not* have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

OAS Model Law, Articles 2(c), (5); Inter-American Development Whistleblower Policy, § 28; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(9); FRSA (U.S. rail workers), 49 U.S.C. § 20109(a)(2); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a)(2); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(a)(4); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(a)(1)(B)

**Protection against spillover retaliation** The law should cover all common scenarios that could have a chilling effect on the responsible exercise of free-expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistakenly) or as "assisting whistleblowers" (to guard against guilt by association) as well as individuals who are "about to" make a disclosure (to preclude preemptive strikes to circumvent statutory protection and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercising anti-retaliation rights.

OAS Model Law, Articles 2(g), 5; World Bank Group Policy on Eradicating Harassment, Guidelines for Implementation (World Bank Harassment Guidelines), § 9.0 (Mar. 1, 2000); European Bank for Reconstruction and Development (EBRD), Grievance and Appeals Procedure (Employee Grievance Procedures), § 10.02 (2002); Asian Development Bank (ADB) Administrative Order No. 2.06: Administrative Review and Appeal (Administrative Review), § 10.1 (July 9, 1998); ADB Personnel Policy § 2.12; ACA (Korea), Article 31; Uganda 2010 WPA, § 1(d); WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8) (case law) and § 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regulatory Commission, Department of Energy and regulated corporations), 42 U.S.C. § 5851(a); FRSA (U.S. rail workers), 49 U.S.C. § 20109(a); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(a); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(a)

**No loopholes protection for all citizens with disclosures relevant to the public service mission** Coverage for employment-related discrimination should extend to all relevant applicants and personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization's mission. It should not matter whether they are full-time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines the organization's mission, the

reprisal victim should have rights. This means the mandate must also cover those who apply for jobs, contracts, or other funding because blacklisting is a common tactic.

Most significantly, whistleblower protection should extend to those who participate in or are affected by the organization's activities. Overarching US whistleblower laws, particularly criminal statutes, protect all witnesses from harassment because it obstructs government proceedings.

U.N. policy, § 8; OAS Model Law, § 2(b); Anti-Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]), Pillar 3; Asian Development Bank Audit Manual, § 810.750; PIDA (U.K.), § 43 (K)(1)(b-d); ACA (Korea), Article 25; Whistleblower Protection Act of 2004 (Japan WPA), § 2; Ghana WPA, § 2; Uganda 2010 WPA, § 1(d); Foreign Operations Appropriations Act of 2005 (Foreign Operations Act) (U.S. MDB policy), § 1505(a)(11) (signed Nov. 14, 2005); False Claims Act (U.S. government contractors), 31 U.S.C. §§ 3730(h), 8-9; STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(j); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(g)(2)-(4)

**Reliable anonymity protection** To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect.

U.N. policy, § 5.2; OAS Model Law, Articles 10(5), 20-22; Asian Development Bank Audit Manual, §§ 810.175, 820.915, 830.400, 830.500, 830.530; 2003 Office of Auditor General Anticorruption (OAGA) Annual Report, at 3, explained in letter from Peter Pedersen, ADB Auditor General to GAP (Nov. 12, 2003) (Pedersen letter) (available at GAP); PSA (Can.), §§ 28.17(1-3), 28.20(4), 28.24(2), 28.24(4); ACA (Korea), Articles 15 and 33(1); Uganda 2010 WPA, § 14; WPA (U.S. federal government), 5 U.S.C. §§ 1212(g), 1213(h); FRSA (U.S. rail workers), 49 U.S.C. § 20109(i); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(h); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(h)

**Protection against unconventional harassment** The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity whether active, such as termination, or passive, such as refusal to promote or

provide training. Recommended, threatened, and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In nonemployment contexts it could include protection against harassment ranging from discipline to litigation.

OAS Model Law, Article 2(g); World Bank Harassment Guidelines, § 1; ADB Audit Manual, §§ 810.750, 830.530; Pedersen letter; EBRD Employee Grievance Procedures, §§ 4.01, 6.01(a); IDB Staff Rule 323 §§ 102, 301, 2101-02; IDB Staff Rule 328 § 105; ACA (Korea), Article 33; Uganda 2010 WPA, §§ 1(d), 10, 11; WPA (U.S. federal government), 5 U.S.C. § 2302(b) (8) and associated case law precedents; FRSA (U.S. rail workers), 49 U.S.C. § 20109(a); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(a); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(a); ARRA (U.S. Stimulus Law), P.L. 111-5 § 1553(a)

**Shielding whistleblower rights from gag orders** Any whistleblower law or policy must include a ban on gag orders through an organization's rules, policies, or nondisclosure agreements that would otherwise override free-expression rights and impose prior restraint on speech.

OAS Model Law, Article 6; PIDA (U.K.), § 43(f); PDA (S. Afr.), § 2(3)(a, b); Ghana WPA, § 31; Uganda 2010 WPA, § 13; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8); Transportation. Treasury; Omnibus Appropriations Act of 2009 (U.S.), § 716 (anti-gag statute) (passed annually since 1988); FRSA (U.S. rail workers), 49 U.S.C. § 20109(h); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(g); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(g); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(d)(1)

**Providing essential support services for paper rights** Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and to legal defense funding can make free-expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize

resource handicaps and cut through draining conflicts to provide expeditious corrective action. The US Whistleblower Protection Act includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on the whistleblower's behalf. Informal resources should be risk-free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

OAS Model Law, Articles 9(1), 10(1)(5-8), 13, 29-30; World Bank Harassment Guidelines, § 3.0; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; WPA (U.S. federal government), 5 U.S.C. § 1212; Inspector General Act (U.S.), 5 U.S.C. app.; ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(b)

## Forum

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and in reality.

**Right to a genuine day in court** This criterion requires normal judicial due process rights—the same rights enjoyed by citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure, and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. This is particularly significant for the preliminary stages of informal or internal review, which are inherently compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial, those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

U.N. policy, § 6.3; OAS Model Law, Articles 11, 14; Foreign Operations Act (U.S. MDB policy), § 1505(11); PIDA (U.K.), Articles 3, 5; PDA (S. Afr.), § 4(1); ACA (Korea), Article 33; Uganda 2010 WPA, §§ 9(3), (4); WPA (U.S. federal government), 5 U.S.C. §§ 1221, 7701-02; Defense Authorization

Act (U.S.) (defense contractors), 10 U.S.C. § 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. §§ 5851(b)(4), (c)-(f); FRSA (U.S. rail workers), 49 U.S.C. § 20109(c)(2)-(4); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(4)-(7); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(4)-(7); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(b); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105 (c)-(e); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(c) (3)-(5)

**Option for alternative dispute resolution with an independent party of mutual consent** Third-party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor/management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes while circumventing the issue of whether intergovernmental organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the model whistleblower law to implement the OAS Inter-American Convention against Corruption, as well as the US Whistleblower Protection Act.

OAS Model Law, Article 10(14); Foreign Operations Act (U.S. MDB policy), § 1505(a)(11); WPA (U.S. federal government), 5 U.S.C. § 7121

## Rules to Prevail

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights—and win.

**Realistic standards to prove a violation of rights** The US Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards such as the OAS model law, and by individual organizations such as the World Bank.

This emerging global standard is that a whistleblower establishes a prima facie case of violation by establishing through a preponderance

of the evidence that the protected conduct was a "contributing factor" in the challenged discrimination. The discrimination need not involve retaliation but occur only "because of" the whistleblowing. Once a prima facie case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the US government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from 1 to 5 percent annually to 25 to 33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, for the intergovernmental organization to commit to one of these proven formulas to determine the bottom line—tests the whistleblower must pass to win a ruling that his or her rights were violated.

OAS Model Law, Articles 2(h), 7; World Bank, Department of Institutional Integrity Investigations Manual, § 7.4; Foreign Operations Act (U.S. MDR policy), § 1505(11); WPA (U.S. federal government), 5 U.S.C. §§ 1214(b)(2)(4), 1221(e); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(3); FRSA (U.S. rail workers), 49 U.S.C. 20109(c)(2)(A)(i); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(2)(B); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(2)(B); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(b)(2)(c); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(1); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(c)(1)

**Realistic time frame to act on rights** Although some laws require employees to act within 30 to 60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common-law rights and are preferable.

World Bank, Appeals Committee Procedures, § 5, Administrative Tribunal Statute, Article II.2; EBRD Employee Grievance Procedures, §§ 2.03, 5.02; PIDA (U.K.), § 48.3; PDA (S. Air.), § 4(1); WPA (U.S. federal government), 5 U.S.C. § 1214; False Claims Act (U.S. government contractors), 42 U.S.C.

§ 3730(b) and associated case law precedents; Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(1); FRSA (U.S. railroad workers), 49 U.S.C. § 20109(d)(2)(A)(ii); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(1); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(1); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(1); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(b)(1)

## Relief for Whistleblowers Who Win

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice not only by adequately helping the victim obtain a net benefit but also by holding the wrongdoer accountable.

**Compensation with "no loopholes"** If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect, and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In nonemployment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

OAS Model Law, Articles 10(10), 16-17; Foreign Operations Act (U.S. MDR policy), § 1505(11); ACA (Korea), Article 33; PIDA (U.K.), § 4; WPA (U.S. federal government), 5 U.S.C. § 1221(g)(1); False Claims Act (U.S. government contractors), 31 U.S.C. § 3730(h); Defense Authorization Act (U.S. defense contractors), 10 U.S.C. § 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(2)(B); FRSA (U.S. rail workers), 49 U.S.C. § 20109(e); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(3)(B), (d); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(3)(B), (b)(4); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(3)(B); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(b)(2)(A), (B), (b)(3)

**Interim relief** Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may merely be an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or

trial, an unemployed whistleblower could go bankrupt while waiting for the completion of an appeals process that frequently takes years.

U.N. policy, § 5.6; OAS Model Law, Articles 9(12), 10(1), 24; PIDA (U.K.), § 9; WPA (U.S. federal government), 5 U.S.C. §§ 1214(b)(1), 1221(c); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(1); SOX (U.S. publicly traded corporations), 5 U.S.C. § 1214(b)(1)

**Coverage for attorney's fees** Attorney's fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory because attorney's fees often reach sums that exceed the whistleblower's annual salary.

OAS Model Law, Article 16; EBRD Employee Grievance Procedures, § 9.06; WPA (U.S. federal government), 5 U.S.C. § 1221(g)(2-3); False Claims Act (U.S. government contractors), 31 U.S.C. § 3730(h); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(2)(B)(ii); FRSA (U.S. rail workers), 49 U.S.C. § 20109(e); NTSSA (U.S. public transportation) 6 U.S.C. § 1142(d)(2)(C); CPSIA (U.S. corporate retail products), 15 U.S.C. §§ 2087(b)(3)(B), (b)(4)(C); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(c)(2)(C); STAA (U.S. corporate trucking industry), 49 U.S.C. §§ 31105(b)(3)(A)(iii), (B); ARRA (U.S. Stimulus Law), P.L. 111-5 §§ 1553(b)(2)(C), (b)(3)

**Transfer option** It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. For any realistic chance at a fresh start, whistleblowers who prevail must have the ability to transfer. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

U.N. policy, § 6.1; OAS Model Law, Article 10(7); EBRD Employee Grievance Procedures, § 9.04; ADB Audit Manual, § 810.750; PDA (S. Afr.), § 4(3); ACA (Korea), Article 33; WPA (U.S. federal government), 5 U.S.C. § 3352

**Personal accountability for reprisals** To deter repetitive violations, those responsible for whistleblower reprisal must be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. In selective scenarios such as obstruction of justice, some nations, including Hungary and the United States, impose potential criminal liability for whistleblower retaliation.

U.N. policy, § 7; OAS Model Law, § 18; EBRD, Procedures for Reporting and Investigating Suspect Misconduct, § 6.01(a); Staff Handbook, ch. 8.5.6; ACA (Korea), Article 32(8); Hungary, Criminal Code Article 257, "Persecution of a Conveyor of an Announcement of Public Concern"; Public Interest Disclosure Act, No. 108, § 32; Uganda 2010 WPA, § 16; WPA (U.S. federal government), 5 U.S.C. § 1215; FRSA (U.S. rail workers), 49 U.S.C. § 20109(e)(3); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(d)(3); CPSIA (U.S. corporate retail products), 15 U.S.C. §§ 2087(b)(3)(B), (b)(4)(C); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1513(e); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(3)(C)

## Making a Difference

Whistleblowers risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions and the public: positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

**Credible corrective action process** Whether through hotlines, ombudsmen, compliance officers, or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or

law enforcement action. In addition to a good-faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the charges that merited an investigation and to report whether there has been a good-faith resolution. As a rule the whistleblower, rather than investigators or finders of fact, is the most knowledgeable, concerned witness in the process. Whistleblowers' evaluation comments have in fact led to significant improvements and changed conclusions in the US Whistleblower Protection Act. Whistleblowers should not be silenced in the final stage of official resolution of the alleged misconduct they risked their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and the whistleblower's comments should be a matter of public record, posted on the organization's website. The most significant reform is to enfranchise whistleblowers and citizens to "walk the talk" by filing formal actions against illegality exposed by their disclosures. In government statutes, these types of suits are known as private attorney general, or *qui tam*, actions (see the following section).

OAS Model Law, Articles 10(13), 27-28; ACA (Korea), Articles 30, 36; PSA (Can.), § 28.14(1) (1990); Japan WPA, § 9 (2004); Uganda 2010 WPA, § 18; WPA (U.S. federal government), 5 U.S.C. § 1213; Inspector General Act of 1978 (U.S. federal government), 5 U.S.C. app.; False Claims Act, 31 U.S.C. § 3729 (government contractors); FRSA (U.S. rail workers), 49 U.S.C. § 20109(j); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(i); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(i)

**Private attorney general option: Citizen Enforcement Act** Even more significant is enfranchising whistleblowers and citizens to file suit in court against illegality exposed by their disclosures. These types of suits are known as private attorney general, or *qui tam*, actions, in reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney's and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good"—a rare marriage of the public interest and self-interest.

In the United States, this approach has been tested in the Federal False Claims Act for whistleblower suits challenging fraud in government contracts. It is the nation's most-effective whistleblower law in history for making a difference, increasing civil fraud recoveries in government contracts from \$27 million annually in 1985 to more than \$20 billion since, including more than \$1 billion annually since 2000.

Another tool that is vital in cases of continuing violations is the power to obtain from a court or an objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for intergovernmental organizations is the ability to file for proceedings at independent review mechanisms or inspection panels—the same as for an outside citizen personally aggrieved by institutional misconduct.

False Claims Act, 31 U.S.C. § 3730 (U.S. government contractors)



# T O O L H

## Model Whistleblower Hotline Policy

Since the 2002 passage of the Sarbanes-Oxley Act for corporate accountability, all corporations that are publicly traded in the United States must have whistleblower “hotlines” to the audit committee for each board of directors. This requirement has institutionalized a common practice for decades at government agencies and companies. It has also created a dynamic, growing cottage industry in the United States for what traditionally was a scattered phenomenon with widely varying standards of quality.

Historically, there has been little credible evidence that hotlines are an effective vehicle through which whistleblowers could challenge corruption or other abuses of power sustained by secrecy. This model policy is drawn from the accumulated best practices of the past seven years since SOX reform created a growth market.

### Hotline Requirements

Individuals are invited to make disclosures of information that evidence illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, and any other action that could create significant liability or other risks to the health of the corporation.

The hotline shall be operated 24 hours a day, seven days a week.

Operators designated to receive calls for the hotline shall be certified, based on possession of academic credentials and completion of additional training that represents best practices for this purpose.

The hotline shall be accredited by a recognized national accrediting organization.

The hotline shall be operated in a manner consistent with the following best practices.

**Independence from conflicts of interest** The hotline shall report directly to the agency head, the board of directors of a corporation, or the chief executive officer if no board exists, and may be subjected to discipline only by the board or the CEO if no board exists.

**Access through multiple communication sources** Access shall include confidential telephone reporting, e-mail, personal interview, and confidential mail deposit or similar mechanism.

**Protection from retaliation** The hotline shall be subject to all federal statutory and agency protections for citizens and employees, prohibiting retaliation for reporting illegal or unethical conduct or behavior.

**Confidentiality** The hotline shall comply with federal and agency or department rules providing for the confidentiality of disclosures made to hotline officials and employees. The hotline shall adopt procedures, including secure firewalls and the encryption of e-mail, and employ technology and equipment that reasonably ensure the confidentiality of disclosures that are received or maintained by the hotline.

**Enfranchisement** The hotline shall be operated in a manner that encourages employee and citizen participation. This includes the opportunity to supplement and comment on responses to the disclosures. It also includes an on-the-record assessment that evaluates the effectiveness of hotline resolution for the employee’s concerns and that supports the contribution of additional information promoting evaluation of the initial employee disclosures.

**Transparency** The hotline shall issue an annual report on its effectiveness in terms of overall numbers of complaints or reports received and their disposition, including moneys recovered in a manner consistent

with the protection of confidentiality of the covered employee. The annual report shall include findings and resolution for each case, along with the employee's evaluation comments, which shall be maintained in a publicly available file also posted on the Internet, with necessary deletions for properly classified information or information whose disclosure is specifically prohibited by statute.

T O O L |

## Model Citizen Enforcement Act

### Whereas:

Citizens have been frustrated that they have not been empowered with meaningful control of their lives through expensive, cumbersome government regulatory agencies; and

### Whereas:

The public interest requires that it be illegal to discriminate against government or private employees who make disclosures responsibly challenging violations of law because they are invaluable to law enforcement, to the public's right to know, and to prevent or minimize the consequences of institutional misconduct.

### Therefore Be It Resolved:

**Section 1: Jurisdiction and procedure** Any citizen may challenge violations of law through a jury trial under the procedures available in the False Claims Act (31 U.S.C. § 3729 *et seq.*) unless the parties mutually consent to alternative dispute resolution procedures such as mediation or arbitration.

**Section 2: Relief** A jury may award injunctive relief to stop ongoing illegality, as well as actual or exemplary damages, as it deems appropriate.

### Section 3: Employee Protection

(A) *In general* No employee or other person may be harassed, prosecuted, held liable, or discriminated against in any way because that person (1) has made or is about to make disclosures not prohibited by law or executive order; commenced, caused to be commenced, or is about to commence a proceeding; testified or is about to testify at a proceeding; assisted or participated in or is about to assist or participate in, in any manner, such as proceeding or in any other action to carry out the purposes, functions, or responsibilities of this Act; or (2) is refusing to violate or assist in the violation of this Act.

(B) *Procedures* Cases of alleged discrimination shall be governed by the procedures of the Federal False Claims Act (31 U.S.C. § 3730(h)), unless the parties mutually consent to alternative dispute resolution procedures such as mediation or arbitration.

(C) *Burdens of proof* The legal burdens of proof with respect to prohibited discrimination under subsection (A) shall be governed by the applicable provisions of the Whistleblower Protection Act of 1989 (5 U.S.C. §§ 1214, 1221).

**Section 4: Conflicts** No funds may be spent to implement or enforce any nondisclosure policy, form, or agreement without explicit provision that, in the event of a conflict, any restrictions on protected activity are superseded by this Act.

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