

Understanding Whistleblower Protection

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Main Topics

1. Global company risks

2. Reporting obligations for corrupt/criminal company activity
3. Advantage of a strict compliance policy
4. Whistleblower obstacles
5. Creating a safe harbor for whistleblowers
6. Recent legal developments



***Global* Risks Faced by Companies**

- Global anti-corruption legislation casts a wide net, and applies to activities abroad:
 - US ***Foreign Corrupt Practices Act (FCPA)***
 - UK ***Bribery Act (UK BA)***
 - Canadian ***Corruption of Foreign Public Officials Act***
- Violating legislation may result in millions of dollars of fines, debarment from federal programs and securities exchanges
- Companies with only minimal ties to the US or UK could be captured by the FCPA or UK Bribery Act

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Global Reporting Obligations

FCPA (USA)

- DOJ/SEC will specifically consider whether a company made a voluntary and timely disclosure in deciding whether to bring an enforcement action
- Increased emphasis on self-reporting
- DOJ/SEC praised Ralph Lauren and Diebold for self-reporting in 2013, used available “cooperation tools”
 - Cooperation Agreements
 - Deferred Prosecution Agreements
 - Non-Prosecution Agreements
- No requirement to self-report, but HIGHLY beneficial

Global Reporting Obligations

UK BA/CFPOA

- **UKBA:** Serious Fraud Office (which handles prosecutions) has stated that a self-report which forms part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice", will influence whether prosecution follows.
- **CFPOA:** Self reporting an important factor in whether a plea deal is reached, and amount of fine.
- No requirement to self-report, but **HIGHLY** beneficial

Vietnamese Reporting Obligations

- **Individuals** are *compelled to report certain crimes*, or could face criminal charges themselves (Penal Code, Article 314)
 - Crimes include **bribery, abuse of power, misappropriation of property**, amongst others
- Those with **“full knowledge”** of a listed offence must report
 - Considering potential liability for slander, only advisable to report where every key fact surrounding the criminal offence is known
- Penal Code **only applies to individuals**, not companies
 - an auditor, employee or member of the board *may* face liability in his or her individual capacity, although company would not
 - **NEW** Draft Penal Code is contemplating *criminalizing companies* and also *extending anti-corruption law to the private sector*

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Advantages of a Strict Compliance Policy

- **General Benefits:**
 - Protects company reputation
 - Increases investor confidence
 - Reduces uncertainty in business transactions
- **Protection from liability under anti-corruption laws**
 - Adequacy of compliance program may serve as a defence to charges
 - Compliance program determines whether action by the authorities will be taken

Advantages of a Strict Compliance Policy FCPA

- Department of Justice (“DOJ”) and Securities Exchange Commission (“SEC”) may decline to pursue charges based on the company’s effective compliance program
- DOJ considers 9 factors in determining whether to charge a corporation, which include “the existence and effectiveness of the corporation’s pre-existing compliance program”
 - Quality of compliance program determines if DOJ resolves charges through cooperation agreement, deferred prosecution agreement or non-prosecution agreement
- SEC considers self-policing prior to misconduct

Advantages of a Strict Compliance Policy

UK BA

- “Failure to Prevent Bribery” provision (s.7)
 - **Adequate Procedures Defence:** adequate procedures in place to prevent bribery
 - Burden of proof on company, balance of probabilities
- Guidance from Secretary of State: 6 Principles
 1. Proportionate Procedures
 2. Top-level Commitment
 3. Risk Assessment
 4. Due Diligence
 5. Communication/Training – involves a reporting system
 6. Monitoring and Review

Advantages of a Strict Compliance Policy CFPOA

- Only 4 convictions to date, 3 guilty pleas
- Importance of compliance program not clearly set out in jurisprudence, frequent reference to FCPA standards
- Can conclude that the adequacy of compliance program is a consideration in sentencing and negotiation of settlement.

- **UK BA Guidance** on company “*Internal and external communication of the commitment to zero tolerance to bribery*”
 - Importance of ‘speak up’ or ‘whistle blowing’ procedures.
 - Importance of having a secure, confidential and accessible means to raise concerns about bribery.

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- Person accused of misconduct could pursue slander charges or bring a civil suit for defamation *against* whistleblower
 - Slander is a criminal offence; if allegations cannot be substantiated, could face criminal charges
 - Defences to defamation not clearly established
- Limited protection from retaliation of employer under Vietnamese law
- Concerns if company insists on corruption reports being passed onto the authorities
 - Corrupt acts cannot be reported to the authorities anonymously
 - Until clear criminal conduct involved, head of the agency handles the investigation but at the same time may face criminal charges or disciplinary action

Legal risks for whistleblowers (cont.)

Slander charges



- *Those who spread stories knowing them to be fabricated in order to infringe upon the honor or damage the legitimate rights and interests of other persons or **make up a story that other persons commit crimes and denounce them before the competent agencies** shall be subject to warning, non-custodial reform for up to 2 years or a **prison term of between 3 months and 2 years.***
- If slander against “person performing official duties” → **1 to 7 years imprisonment**
- May also face fine of VND 1 million to 10 million, banned from certain posts or jobs for 1 to 5 years (**Art. 122, Penal Code**)

Legal risks for whistleblowers (cont.)

Slander charges

- Criminal liability only ensues if individual deliberately makes untrue statements
- However, the law seems to assume accusations are deliberately untruthful if they are false:
 - *Law on Anti-Corruption*: individuals who deliberately lodge untruthful denunciation shall be strictly dealt with and pay compensation (Art. 64.3)
 - *Law on Denunciation*: If accusation incorrect, will “handle those who deliberately make untruthful denunciation” (Art. 25.1)
 - Neither act addresses incorrect accusations made in good faith

- *A person causing spiritual damage to another person by harming his or her life, health, honour, dignity or reputation must, in addition to ceasing the harmful acts and making a public apology and retraction, pay a sum of money to such other person to make up for the spiritual damage caused (Civil Code, Art. 307.3)*
- No categorical defenses like those that exist in common law (eg., qualified privilege in Canada would likely serve as defense if reporting suspected corruption)
- Unclear what defences the court would accept, dependent upon court discretion

➤ *Only protected if make official complaint to the authorities, and may not apply to corruption reports*

➤ Public Employees

- Job assured, no discrimination (Denunciation Law, Art. 37, would also apply for anti-corruption)
- If treated unfairly by employer, can complain to authority handling complaint and authority has wide range of powers to restore position of employee

➤ If not a public employee, must request trade union or local labor management agency for protection (Decree No. 76, Art.18)

- Within 5 working days, the union or agency shall examine the request
- If request is legitimate, within 3 working days must request employer to stop the violation and restore the employee's rights, and/or
- Request a competent person to handle the violator in accordance with the law

- No specific provisions in Vietnamese Labor Code to protect whistle-blowers
 - Permitted to dismiss an employee for acts causing, or threatening to cause, serious damage to an employer's interests or assets (Art 126.1, Labor Code)– incorrect reports could fit this definition

Legal risks for whistleblowers

Report to Authorities

- Risk of company insisting on passing on report to authorities: lack of anonymity and conflict of interest
- Anonymity not allowed for reports of corruption to authorities
 - **Anti-Corruption Law:** Denunciations made anonymously or under false name will *not* be investigated *unless* there is concrete evidence (Arts. 54.3 and 55.4)
 - Unclear why anonymity not allowed for corruption reports, as it is permitted for reports of other types of government misconduct

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Practical Tips- Overview

Employee Protection

1. Measures to protect employee anonymity when making reports
2. Ensure thorough, timely and independent investigations with the option of whistleblower involvement
3. Create binding company assurances of a “no retaliation policy” against whistleblowers, and clear mechanisms for addressing, disciplining those who attempt to retaliate
4. Establish a reward system for substantiated reports

➤ **ALL SHOULD BE PART OF COMPLIANCE POLICY**

- If report is passed onto the authorities, cannot be anonymous, but could permit it to be anonymous if only reported within the company
- Whistle-blower procedures should be highly visible and understandable – post information at workplace, include information in all company policies, provide leaflets to employees
- Secure and confidential advice lines, hotlines, online portals
- Some companies engage independent third parties to manage their hotlines and websites to ensure employee anonymity
 - Increases likelihood that whistle-blower will not be identified

Practical Tips Employee Protection- Investigations

- Must be *thorough, timely* and *independent*
 - Should engage an independent third party to carry out investigation; ex: a law firm.
- Whistleblowers should be provided the opportunity to be involved, but should not be required to participate.
 - Should have opportunity to clarify complaint
 - Should have option of being informed of outcome
- May be possible to maintain anonymity while requesting further information and clarification
- If concerns of retaliation by accused person, should take measures to temporarily remove retaliator from position of power (suspension)

Practical Tips

Employee Protection- Assurances

- The company could take legally binding measures to provide protection
- ***Internal Labor Regulations***: labor rules of company which are registered with the labor authority are legally binding upon a company
 - Could include provisions stating that the company will not undertake any disciplinary action in relation to a good faith report on suspected misconduct
 - Could include provisions specifically addressing disciplinary action to be taken where another employee has retaliated against a whistleblower

Practical Tips

Assurances (cont.)

- **Labor contracts** with employees could include provisions stating that the company is not entitled to take any disciplinary action against the employee for good faith reports, and is obligated to protect the employee from retaliation.
- Company **Ethics Policies** and **Codes of Conduct** should include a clear commitment to whistleblower protection and clearly state “no retaliation” policy.
- **Ombudsperson** could be appointed within the company to assist in representing whistleblower interests to management.

Practical Tips

Reward System

- The personal costs of whistleblowing *should be recognized*
 - It is a very stressful and risky endeavour
- Monetary awards or paid time-off may be appropriate
- Should be a consideration when determining promotions

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Compliance Policy and *Whistleblowers* Vietnam

- **NEW** Joint Circular No. 01/2015/TTLT-TTCP-BNV of the Government Inspectorate & the Ministry of Home Affairs (dated 16 March 2015, effective 1 May 2015)

Rules on rewarding whistleblowers

- Potential rewards: Bravery Medal, Honour Certificate from the Prime Minister, and Honour Certificate from other relevant authorities.
- Potential monetary rewards: If assist in recovering over 600 times the current basic wage level, receive 10% of amount up to VND3.4 billion (US\$160,000).
- ***Only applies to whistleblowing of public/gov. officials***

Compliance programs more important than ever...

2015 Draft Penal Code

- Penalties applied to juridical person (i.e. companies) are mainly monetary fines, forcible termination of business, and forcible revocation of business license. (Article 34)

- **Corruption-related offenses can apply to private sector**
 - Article 353 to extends four corruption-related offences to those working in private sector.
 - embezzlement
 - receiving bribery
 - giving bribery
 - bribery brokerage.

**Any
Questions?**



Thank you!

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