

# Blowing the whistle on corruption in the US and China

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While the new anti-corruption whistleblowing provisions of the US Dodd-Frank Act have garnered much recent attention and consternation, it is worth remembering that the Chinese government has also recently enhanced its whistleblowing arsenal.

The whistleblower programmes of both countries operate by incentivising and protecting people who provide information to the authorities.

Given the increased willingness to share information on corruption between Chinese and American law enforcement authorities, companies should be cognisant of the effect that these programmes may have on their compliance efforts - regardless of where the whistle is blown.

## The SEC whistleblower programme

On May 25, 2011, the Securities and Exchange Commission (SEC) adopted the Whistleblower Program mandated by Section 922 of the Dodd-Frank Act. The programme became effective on August 12, 2011.

Modelled on the whistleblower programme of the Internal Revenue

Service, the SEC programme is intended to enhance the SEC's investigative ability by incentivising people to come forward with material, credible information about potential securities law violations, including violations of the Foreign Corrupt Practices Act (FCPA).

In particular, the SEC will pay an award to one or more whistleblowers (including non-US parties) who: (1) voluntarily provide the SEC, (2) with original information, (3) that leads to a successful SEC federal court or administrative action, (4) in which the SEC obtains monetary sanctions totalling more than US\$1 million.

If all of these conditions are met, the SEC will pay an award of at least 10% but no more than 30% of the total monetary sanctions collected in successful SEC and related actions. Monetary sanctions include penalties, disgorgement and interest. At the same time, whistleblowers are provided significant protections against retaliation by employers.

Whistleblowing is actually at the centre of the SEC's strategy to further enhance its enforcement activity by encouraging companies to cooperate proactively in the compliance area. As stated by the SEC chairman, Mary L. Shapiro<sup>1</sup>, "for an agency with limited resources like the

## Key issues

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<sup>1</sup> Opening statement at SEC Open Meeting, May 25, 2011, Chairman Mary L. Schapiro, U.S. Securities and Exchange Commission : <http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm>

SEC, [...] it is critical to be able to leverage the resources of people who may have first-hand information about potential violations."

## The Chinese whistleblowing rules

In China, both the central and local government, as well as the Disciplinary Commission of the Chinese Communist Party (CPC), have set up anti-corruption whistleblowing hotlines in the last few years. For example, the Supreme People's Procuratorate (SPP)<sup>2</sup>, the Ministry of Audit<sup>3</sup>, the Ministry of Supervision (which is responsible for supervising government officials)<sup>4</sup>, and their respective local branches<sup>5</sup> have set up hotlines or websites to accept tips from whistleblowers.

Both the Administrative Supervision Law and the CCP Internal Supervision Rules set out rules for whistleblowing. Specifically, the Ministry of Supervision is the authority charged with investigating governmental officials' compliance with the relevant anti-corruption rules. The Disciplinary Commission is an internal agency of the CCP which supervises and investigates CCP members' compliance with the anti-corruption rules.

These hotlines and websites have been used often by whistleblowers. According to official data disclosed in 2008, more than 70% of the criminal abuse of public power offences committed by governmental officials have been prosecuted based on whistleblowing tips.<sup>6</sup> In the first week after the SPP's whistleblowing hotline and website were set up in 2009, more than 10,000 calls

and 6,000 online posts were received. In 2011 to date, local prosecutors' offices reported similar figures<sup>7</sup>.

Rewards may be granted to whistleblowers, as provided under the relevant law and regulations such as the Administrative Supervision Law and its Implementing Regulations. The Rules of Dealing with Whistle-blowing by the People's Prosecutors of 2009 provide that if a whistleblowing tip is proven to be true and a conviction is obtained, both spiritual honours and material rewards should be granted to the whistleblower.<sup>8</sup>

In accordance with the relevant laws and regulations, whistleblowers are to be strictly protected and retaliation is prohibited. In reality, however, protection of whistleblowers is reportedly weak and retaliation not uncommon. According to figures provided by the SPP in 2010, more than 70% of whistleblowers are retaliated against, of which the majority cannot find any effective remedy from the government or judicial authority.<sup>9</sup> The methods of retaliation range from de facto demotion and illegal detention to assassination.

Although reporting corporate bribery is not regulated under PRC law, such whistleblowing is encouraged and reports can be made to the central and local Administration of Industry and Commerce<sup>10</sup> for administrative penalty or to the police for criminal investigation.

## Recommendations

The impact of whistleblower provisions on internal compliance programmes is a fiercely contentious issue. Industry

contends that the incentives provided by outside programmes and hotlines encourage whistleblowers to bypass established internal compliance reporting systems in favour of going directly to the government to ensure eligibility for an award. Thus, all of the considerable resources that companies devote to establishing internal reporting and remediation programmes are arguably undermined if they are not given an opportunity to uncover and report corruption issues themselves, thereby receiving some return on their investment. Despite these concerns and the governments' interest in encouraging strong compliance programmes, neither governments' programmes require that whistleblowers first report violations internally. The US programme does, however, provide some incentives such as, for example, a higher reward when the whistleblower voluntarily participates in a company's internal reporting systems. Moreover, the US programme preserves a whistleblower's "place in line" if the report is first made to the company and then, reported to the SEC within 120 days.

In this pro-whistleblowing environment, a compliance programme must recognise the reality of reverse incentives for internal reporting. The programme should include company-wide publication of the designated internal channels for reporting, while emphasising that the SEC whistleblowing bounty will not be jeopardised if the employee reports internally first. Once a tip is received, a quick and thorough response to the allegations of misconduct is an absolute requirement for any company. Training and communication should include clear

<sup>2</sup> Whistleblowing hotline: 12309 and website <http://www.12309.gov.cn/>

<sup>3</sup> Whistleblowing number: 010-68301242 and website: <http://www.audit.gov.cn/cysite/chpage/c175/>

<sup>4</sup> Hotline: 12388 and online whistleblowing platform: <http://www.12388.gov.cn/xf/index.html>, shared with the Central Disciplinary Commission of the CPC.

<sup>5</sup> For example, Shanghai Supervision Bureau: <http://shanghai.12388.gov.cn/site/index.jsp>; Beijing Procuratorate <http://www.bjjc.gov.cn/wsjb/main/main.jsp>.

<sup>6</sup> [http://www.china.com.cn/law/txt/2008-02/24/content\\_10585079.htm](http://www.china.com.cn/law/txt/2008-02/24/content_10585079.htm)

<sup>7</sup> For example, figures in 2011 shows that in Tianjin, more than 50% of the prosecution of governmental officials for abusing public power is based on whistleblowing tips. (<http://www.chinacourt.org/html/article/201106/22/455343.shtml>). In Guizhou Province, the majority of such cases are based on whistleblowing ([http://www.legaldaily.com.cn/index/content/2011-06/20/content\\_2752543.htm?node=20908](http://www.legaldaily.com.cn/index/content/2011-06/20/content_2752543.htm?node=20908)).

<sup>8</sup> 10% of the illegal interest returned by the criminal defendant should be rewarded to whistleblower, up to RMB200,000 if the whistleblowing is a significantly important contribution to the conviction and the reward is approved by a provincial government.

<sup>9</sup> <http://news.qq.com/a/20100620/000271.htm>

<sup>10</sup> Hotline: 010 68024231 or 12315

anti-retaliation messages for managers and employees to instill confidence in the internal compliance programme.

While a company can rarely match the monetary rewards offered by government whistleblower programmes, it can create a culture of trust and loyalty that outweighs monetary incentives or at least encourages employees to postpone their immediate gratification.

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