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## **Global outlook: disputes – Taiwan**

### **Emerging need for whistleblower programs**

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As reported in KPMG's 2016 Global Profiles of the Fraudster, more than half of the frauds were uncovered by whistleblowers and tip-offs. So to more effectively root out corporate malfeasance and corruption, some countries have promulgated laws to make internal reporting channels in both the public and private sectors mandatory. The laws include the Whistleblower Protection Act (1989) and the Sarbanes-Oxley Act (2002) of the United States, the Public Interest Disclosure Act (1998) of the United Kingdom, and the Public Interest Disclosure Protection Act (2004) of Japan.

Aware that internal or external reporting can facilitate fraud exposure, Taiwan has, in recent years, created or amended whistleblower programmes to boost food safety and environmental protection. On 3 June 2015, the Food Safety Whistleblower Reward Plan was amended to raise the financial rewards for whistleblowers. On 1 August 2018, an amendment to the Air Pollution Control Act was enacted to ban any discharge, demotion, pay cut or any other retaliatory treatments against employees who blew the whistle on air pollution violations.

#### **New legal requirements in specific sectors**

There is more extensive legislation on the way. Lately Taiwan's Financial Supervisory Commission (FSC), the competent authority overseeing the operations of all the financial institutions, enacted similar amendments, hoping that a mandatory whistleblower programme could lead to stricter legal compliance among all the bank holding companies and banks, one of the few chartered businesses in Taiwan.

According to the new internal control and auditing guidelines the FSC amended this March, starting from October this year, every bank holding company and bank has to set up a reporting channel and appoint an independent unit at its headquarters to investigate every incident reported. The channel can be a mailbox or a hotline established by either the company or the bank itself or an independent third party, such as a law firm or an accounting firm. Whenever there is a suspected crime, fraud or illegal scheme, an insider or an outsider can use the channel to raise the alarm. To protect the whistleblowers, the guidelines require that (1) the whistleblowers' identities and their reports be kept in strict confidence; (2) no retaliatory treatments be imposed on the whistleblowers; and (3) appropriate rewards be given to the whistleblowers.

Starting this December, all the insurance companies and service providers in the securities and futures market will be subject to a similar set of requirements. So far, listed companies on the stock exchange market and the over-the-counter market are only encouraged to create their own whistleblower protection programmes, but this recommendation should become mandatory soon.

#### **Overall whistleblower protection**

Meanwhile, the Ministry of Justice (MOJ), the government agency administering legal and administrative affairs in Taiwan, has been drafting a bill on whistleblower protection since 2012. Once applicable to only the public sector, the bill now extends its reach to the private sector to elicit more fraud disclosure. As the private sector spans a wide spectrum of businesses, different competent authorities and various types of illegal activities, the MOJ still has a long way to go to devise a whistleblowing channel that suits all types of businesses. The bill will eventually be deliberated by the legislature. But right now it is too early to predict when it will be ratified. While the businesses named in the administrative guidelines must establish whistleblower programmes by the specified time limit, the rest of the businesses currently outside the purview of the guidelines are advised to start preparing.

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## **Questions arising from whistleblower reports**

Setting up a whistleblower programme is now a pressing need for all the businesses named in the FSC's administrative guidelines. Unfortunately, the guidelines offer merely a road map on how to establish a whistleblower programme; they do not detail what to do with a whistleblowing report or tip-off. A company receiving a whistleblowing report may have any of the following six questions: (1) Should an internal investigation be conducted? If yes, when? (2) How should the investigation proceed? (3) Should outside counsel be retained for the investigation? If yes, what role should the company play in the investigation? (4) How should potential conflicts of interest be avoided? (5) What preparations should be made before an interview? (6) What should the company do after the investigation is concluded?

Behind all those questions are elaborate legal issues, which need to be taken care of lest the information be inadmissible or the investigation be derailed. Such eventuality not only hurts the whistleblower but also defies the goodwill intent of a whistleblower programme.

## **Assistance from outside counsels**

All the laws regulating whistleblower programmes allow a business to have an independent third party establish a reporting channel and investigate any incidents reported. This is probably because a fraud investigation almost always requires specialised assistance from outside experts such as certified public accountants, attorneys and computer engineers. Even when a business undertakes an investigation itself, it often quickly finds itself wanting outside assistance or counseling.

In terms of legal assistance, engaging outside legal counsel in an internal investigation usually has the following merits: (1) As impartial observers, the outside counsel can see the questions more objectively and are more unrelenting in their quest for answers; (2) Outside counsel, especially litigators experienced in cross-examining witnesses, can better evaluate the credibility of an interviewee's statement; and (3) Outside counsel usually have more experience in handling unexpected situations or requests from interviewees. The requests include having attorneys represent them during the interviews, not having any video or audio recording made of the interviews, keeping their remarks off the record, and demanding transcripts of the interviews or final reports after the investigations are concluded.

A robust whistleblower programme can foster a company's reporting culture and stop potential corruption or crime before it occurs or becomes reportable to the law enforcement agency. So far, only a few types of businesses are legally required to set up whistleblower programmes, but the legal requirement is expected to extend to all other businesses soon. Companies would be well advised to monitor the relevant developments and ally its internal resources with outside assistance to create a reporting programme that best suits its business.