

## Joint Forensics Forum and PAIB seminar –

Whistle-blowing:  
the law, policies  
and procedures  
and how to deal  
with them

23 August 2012

- The objective of this seminar is to help business accountants & company management better understand the key features of a whistle-blowing policy, including how to implement such a policy and make it effective.

# Agenda

- Whistle-blowing RPB in different jurisdictions
- Hong Kong legal framework vs. other jurisdictions re: support and protections available to whistle-blowers
- relevant toolkits/ guidance factors for the design and development of a whistle-blowing policy and system
- practical implementation issues – do's and don'ts
- Examples/cases on how to deal with complaints and reports

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**Ms. Susanna Chiu**

- Vice-President of HKICPA and Chair of PAIB Leadership Panel

**Speaker:**  
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# DISCLAIMER

- *Not a substitute for legal advice*
- *For educational purposes only*



Vs.



# Money Laundering



Extract from  
an ORDER  
PURSUANT  
TO BANKING  
LAW § 39

Issued by  
Department  
of Financial  
Services

- “8. Lest there be any doubt, SCB’s obvious contempt for U.S. banking regulations was succinctly and unambiguously communicated by SCB’s Group Executive Director.
- As quoted by an SCB New York branch officer, the Group Director caustically replied: “You f---ing Americans. Who are you to tell us, the rest of the world, that we’re not going to deal with Iranians.”
- Note 6: Note of Interview with SCB’s Head of Cash Management Services (2002–2005), Head of Compliance (2005–2007) at the New York branch, SCB INT 0004733–4734.

Who do you think is the Whistle-blower in the Standard Chartered Bank Case?

We do not know yet.

One thing we do know now

Kyle Lagow is the Whistle-blower in



**Countrywide**



- ▶ Lagow had filed a suit against his former employer, subprime mortgage lender Countrywide Financial, alleging appraisal fraud.
- ▶ Lagow's portion of the pact was worth \$75 million. In May, he received his cut -- 19 percent of the total. Taxes and legal fees come out of the \$14.5 million.
- ▶ His reward was one of the larger ones among recent finance related whistle-blower cases.

- ▶ The settlement has brought Lagow financial security and a measure of redemption. But it was a long, hard path.
- ▶ Even after his travails, he fears little has changed in the mortgage industry.
- ▶ Source: Reuters
- ▶ (Editing by Dan Wilchins and Leslie Adler)

*FACT SHEET*  
Establishing a  
Whistleblower  
Program  
SEC Open  
Meeting  
May 25, 2011

- The new SEC whistle-blower program, implemented under Section 922 of the Dodd-Frank Act, is primarily intended to reward individuals who act early to expose violations and who provide significant evidence that helps the SEC bring successful cases.
- To be considered for an award, the SEC's rules require that a whistle-blower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than \$1 million.

# Comparison of major jurisdictions

Legislative Framework	USA	UK	Australia	PRC	Singapore	HK
Legal protection Employee	Y	Y	Y	Limited	Limited	Limited
Financial	Y	N	N	N	N	N
Witness Protection Scheme	Y	Y	Y	Y	Y	Y

# Protection of Whistle-blowers in Australia

## Whistle-blower

- An officer
- An employee
- A contractor or their employees who has a contract to supply goods or services

## Protection

- information provided to SAIC in confidence remains confidential
- victimisation of whistle-blowers a crime.
- civil and criminal liability for making the disclosure exemption

## Qualified Receivers

- Australian Securities and Investment Commission
- Auditor / member of audit team
- A director, secretary
- Senior manager

# Protected Disclosure

- Any person authorised by the company to receive revelations
- Must give their name
- Have reasonable grounds to suspect contravention of corporations Act or ASIC Act
- Act in good faith

# Source

- **Information Sheet 0052 (INFO 0052)**
- <http://www.asic.gov.au/asic/asic.nsf/byheadline/Protection+for+whistleblowers?openDocument>

# UK Framework

## Definition of Whistle-blowing

- Making a disclosure in the public interest

## Whistle-blower

- Worker
- Believes malpractice in the work place is happening or has happened or will happen
- Reveals information of the right type (“qualifying disclosure”)
- Reveals to the right person in the right way (“protected disclosure”)

# Qualifying Disclosure

- Criminal offences
- Failure to comply with a legal obligation
- Miscarriage of Justice
- Threats to an individual's health and safety
- Damage to the environment
- A deliberate attempt to cover up any of the above
- Must not break the law in order to make a disclosure or legal professional privilege



## Protected Disclosure

- Made in good faith
- Reasonably believes the information is substantially true
- Reasonably believes that they are making the disclosure to the right “prescribed person”

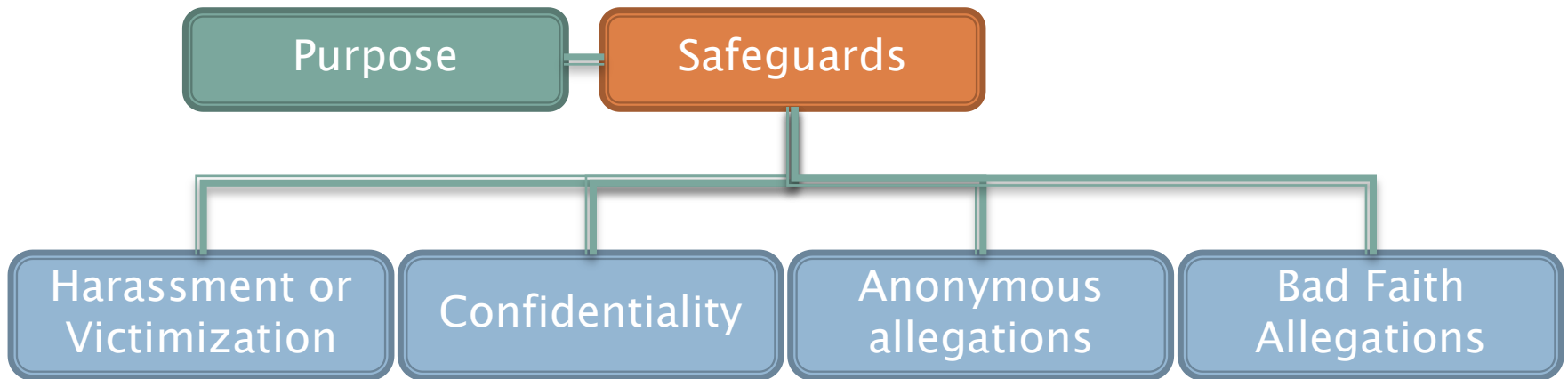
## Dismissal or Victimisation for whistle- blowing

- Can claim unfair dismissal
- Can claim detrimental treatment

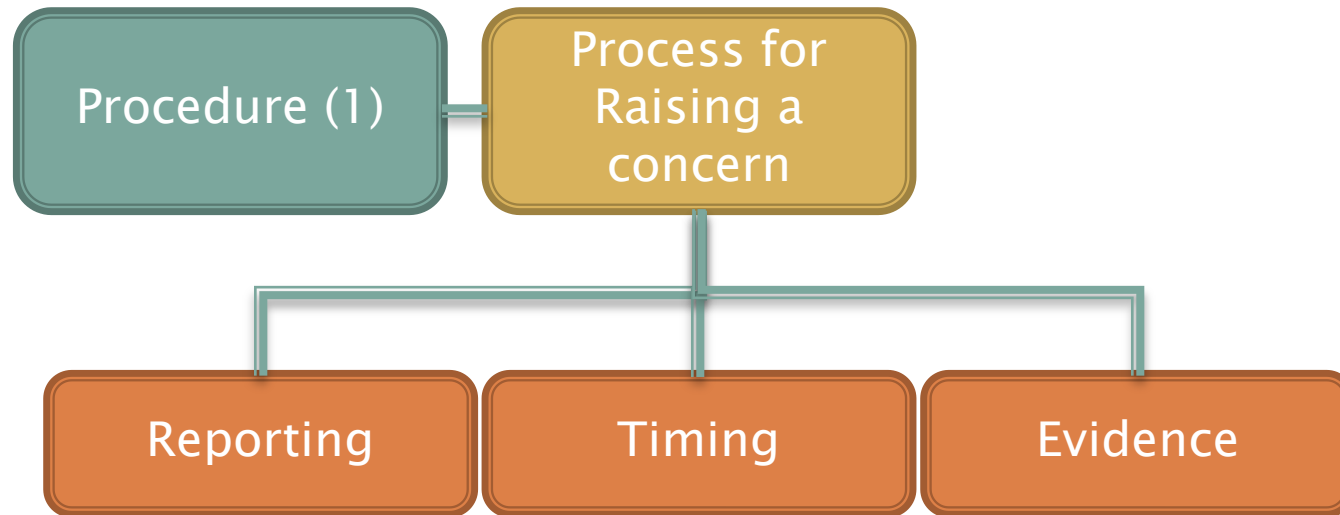
## Recommended Code of Practice

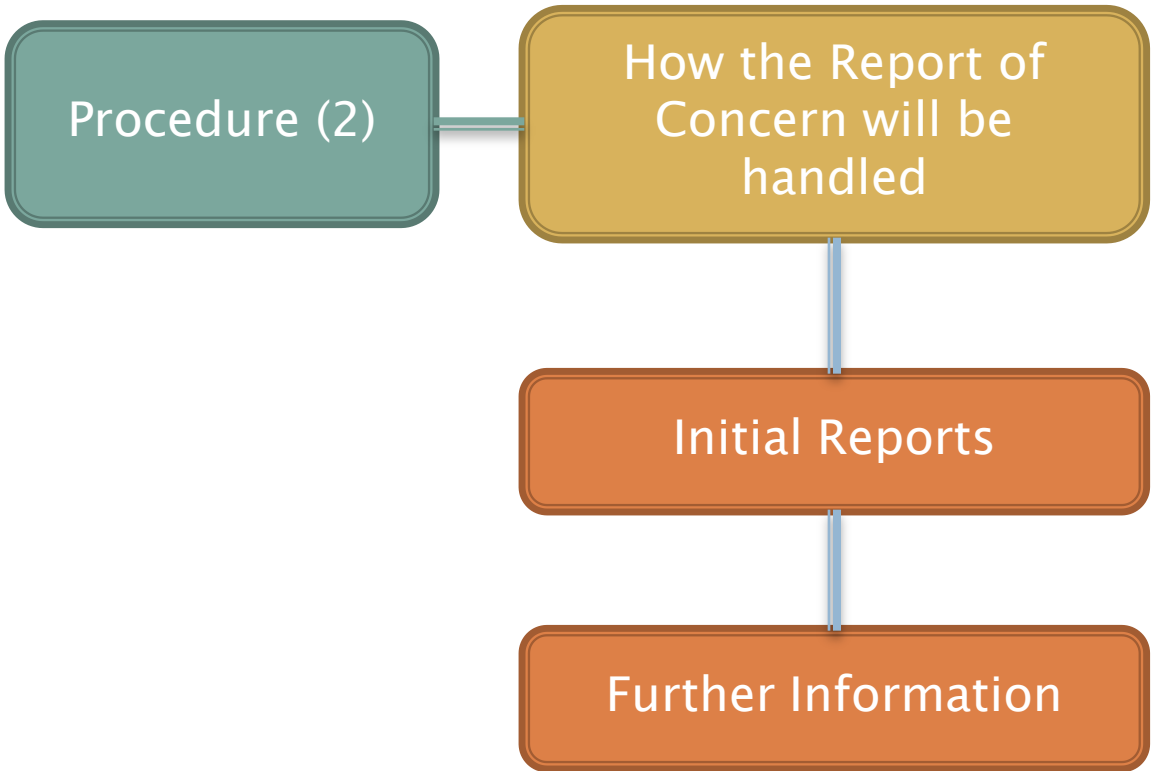
- Public concerns at work
- An independent organisation
- [www.bsigroup.com](http://www.bsigroup.com)
- Developed by public
- Concern at work at collaboration with British standards

# Main features – Whistle-blower Policy



# Main Features – Whistle-blower Policy





# Sample Whistle-blowing Policy

Singapore

USA

PRC

UK

HK

# Relevant tool kits / Guidance

Principles of Internal Investigation

Fair + Lawful

Reasonable suspicious

Defamation

Breach of Confidence

Fraud Risk Management

Best Practices

Managing the business Risk of Fraud

Sponsored by IIA AICPA ACE

Personal Data (Privacy) Ordinance

The Six Data Protection Principles

Monitoring of Employees at Work Guidelines

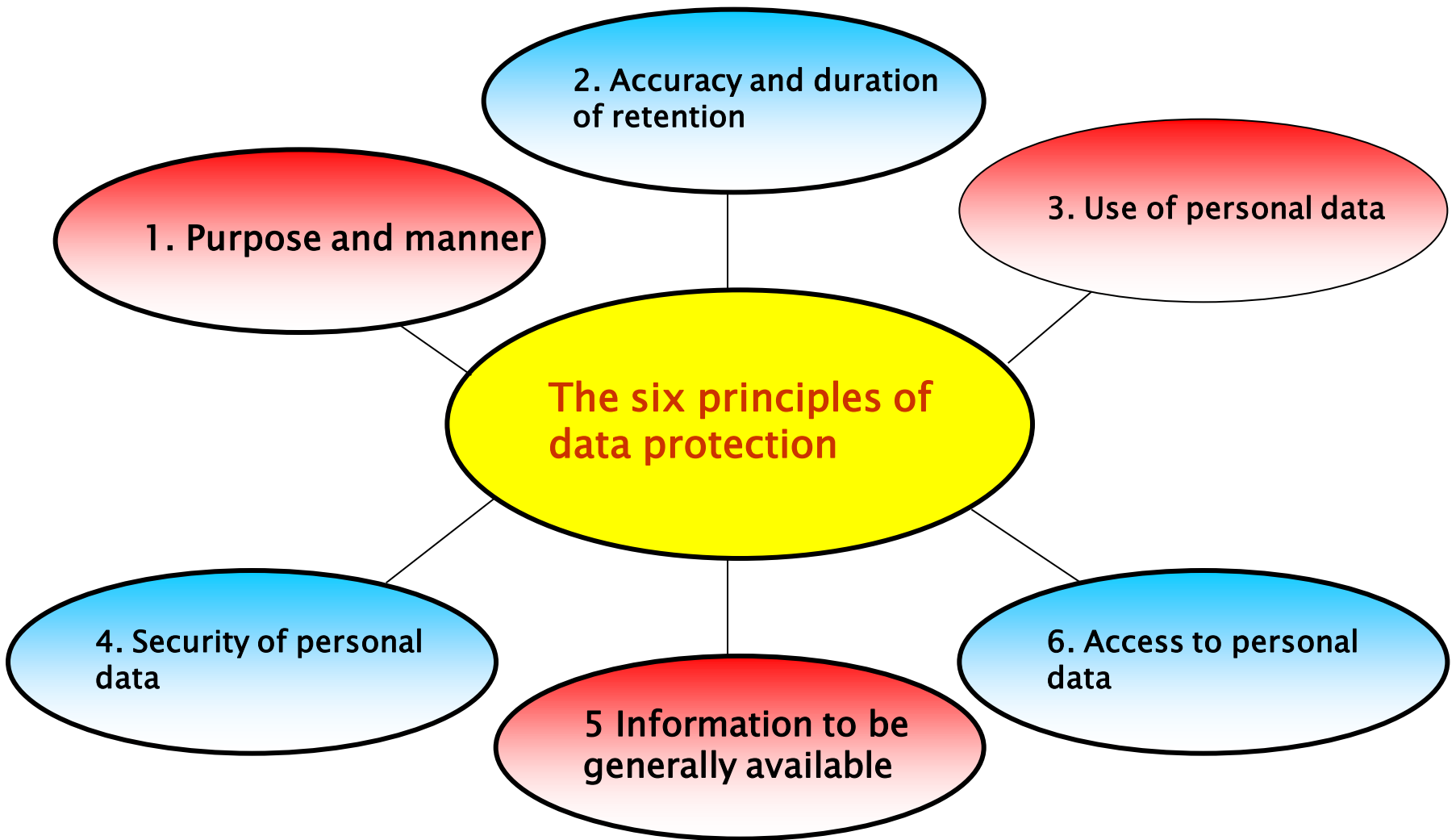
# Key Principles



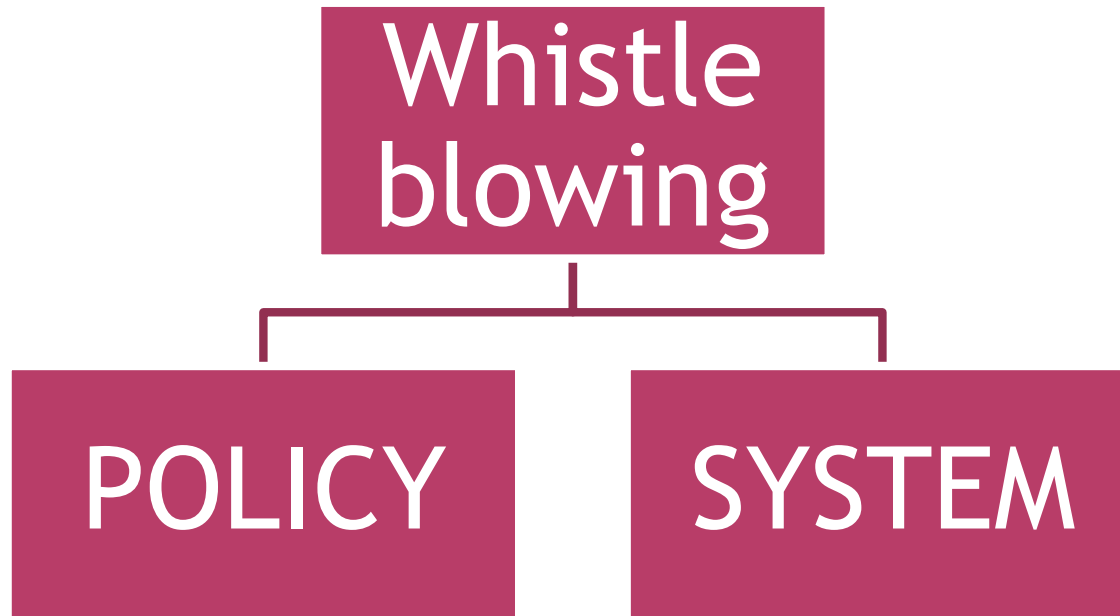
## Fraud Detection

- **Detective Controls**
  - **Whistleblower Hotlines**
  - **Process Controls**
  - **Proactive detection procedures**
- **Documentation of detection techniques**
- **Assessing of the effectiveness of detective controls**
- **Continuing monitoring**





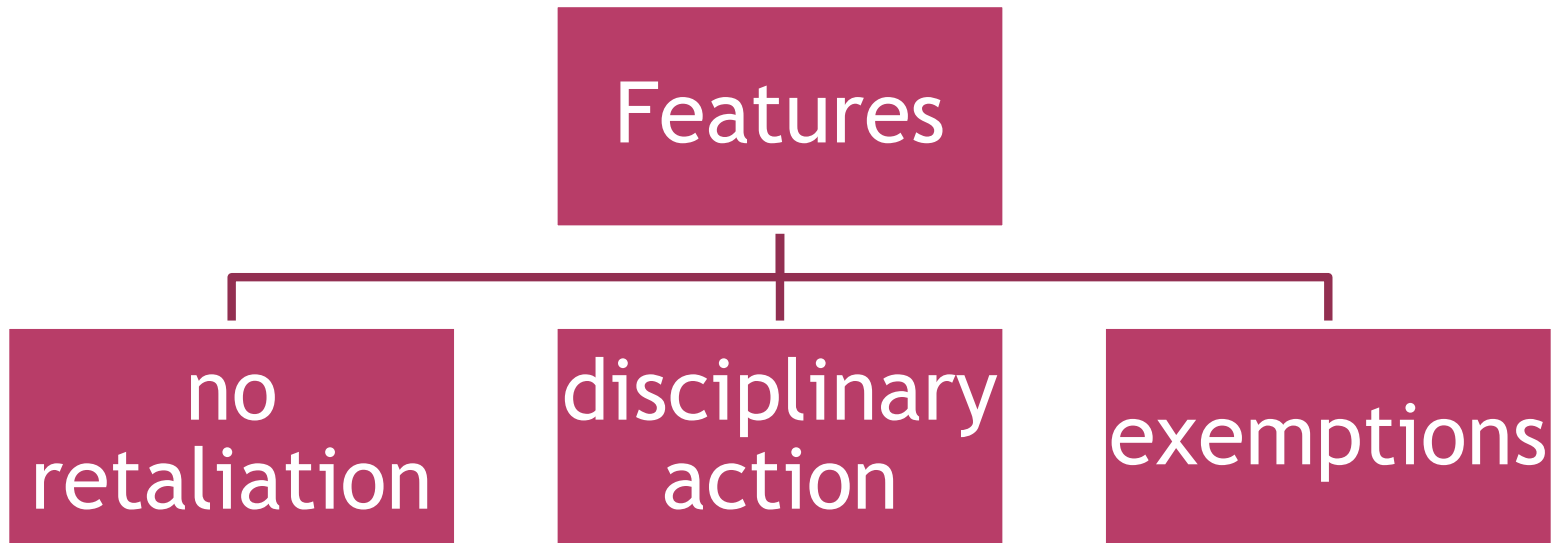
# FACTORS TO BE CONSIDERED IN IMPLEMENTING A WHISTLE BLOWING POLICY AND SYSTEM - OVERVIEW



# WHISTLE BLOWING POLICY SHOULD INCLUDE

- ⦿ Purpose/scope/tolerance/definition
- ⦿ An operating standard, therefore:
  - Must be compliant with
    - internal disclosure
    - external disclosure
    - associated legislation and regulation
- ⦿ -must be monitored and reported

# WHISTLE BLOWING POLICY (CONTINUED)



# WHISTLE BLOWING POLICY - CONTENT

## ◉ Roles and responsibilities

- Senior management
- All employees
- Managers
- Legal/Compliance/Fraud Officer/IAD
- Human resources
- Chief Compliance Officer

# EXAMPLE OF A WB REPORT

- ◉ Summary report
- ◉ Description and date reported
- ◉ Risk rated
- ◉ Action plan and owner
- ◉ Estimated closure date
- ◉ Key issues and recommendations

# DEVELOPING A WB SYSTEM

- ◉ Preferably use external resource for hotline unless you can cope internally
- ◉ Give option of anonymity
- ◉ Give multi-language opportunities
- ◉ Give many ways of contact - postal address, phone, email.

# IMPLEMENTATION OF A WHISTLEBLOWING POLICY

DOs 

DONTs 



## WB SYSTEM MUST

- ⦿ Have procedures in place for receipt, retention and treatment of complaints
- ⦿ Assure the WB that complaint will be dealt with confidentially and anonymously
- ⦿ Feedback must be provided to the WB in a timely manner.

# PRACTICAL CONSIDERATIONS - DO

- ◉ Explain absolute management commitment (tone @ the top) to the policy ✓
- ◉ Train all employees in the policy, i.e. how to raise a concern internally, how to get independent advice, how to make external contacts if necessary, matters raised maliciously ✓
- ◉ Protect the employee ✓
- ◉ Explain how matters will be handled ✓

# DON'T

- ⦿ Don't make it a grievance procedure ✗
- ⦿ Don't drag out investigations ✗
- ⦿ Don't make management decisions and fail to communicate these with those who need to know ✗
- ⦿ Don't entertain malicious gossip ✗

# ILLUSTRATIVE EXAMPLES OF WB COMPLAINTS

1. Recruitment allegations
2. Employees receiving kickbacks
3. Alleged bribery and corruption

# CASE 1 - RECRUITMENT ALLEGATIONS

- Two employees complained to a Board Director, then through the WB hotline about the suspicious behaviour of their new HR director
- Local management investigated and found no case to answer, but HO Compliance had questions
- In the meantime both employees resigned

# CASE 1 - RECRUITMENT ALLEGATIONS

- The independent investigation found that:
  - The HR director lied on her CV
  - The HR director was suing an old employer for defamation and was being sued by her previous employer for data theft
  - The background search done by vendor employed by HR director was not detailed and was incomplete
  - Local management took a lot of convincing to terminate the HR director

# CASE 1 - RECRUITMENT ALLEGATIONS

## ○ Lessons learned

- Don't dismiss allegations as being from "disgruntled employees" - look at motivation
- Don't let local management undertake the investigation - independence issue
- Back ground checks are not always reliable or accurate
- Timing is all

## CASE 2 - EMPLOYEES RECEIVING KICKBACKS

- ⦿ Local management received several anonymous complaints from auto workshops, naming 3 claims employees who were asking for 10% kickbacks before signing off on claim amounts payable to the auto workshops
- ⦿ Kickback payments were made through a third party law firm handling the claims



## CASE 2 - EMPLOYEES RECEIVING KICKBACKS

- ⦿ All negotiations were done by e-mail between the claims handlers and their contact in the law firm who dealt with the auto workshops
- ⦿ The kickbacks were received by the law firm contact and banked in the claims employees' bank accounts

## CASE 2 - LESSONS LEARNED

- ◉ Local management were inclined to ignore anonymous letters since there were so many of them and they contained some wild allegations
- ◉ Local claims department did not want to lose 3 experienced claims handlers
- ◉ Were all the people involved discovered?
- ◉ Problem of finding definitive evidence- company e-mails, confessions.

# CASE 3 - ALLEGED BRIBERY AND CORRUPTION

- A WB used a courier company to deliver an anonymous letter to 3 senior staff alleging bribery and corruption and HR violations by the head of the claims unit
- WB was very detailed about the bribery and corruption activity and threatened to go to the regulator if a thorough investigation was not carried out

# CASE 3 - ALLEGED BRIBERY AND CORRUPTION

- One of the people who received the letter was the labour union representative who sent the letter around the company to all union members so that the investigation became very high profile within the company.

# CASE 3 BRIBERY AND CORRUPTION - CHALLENGES IN THE INVESTIGATION

- ◉ Language - outsource
- ◉ Data privacy laws-victim provided copies of his passport and personal bank accounts for review
- ◉ Computer forensics- PCs e-mails
- ◉ Hearsay evidence versus actual evidence obtained in interview
- ◉ Discounting offer of "help" from an employee
- ◉ Working with an external firm of investigators

## CASE 3 - LESSONS LEARNED

- ⦿ Make all efforts to locate WB
- ⦿ Be mindful of business relationships e.g. with vendors -can you ask them to tattle on employees?
- ⦿ Train all employees in Code of Conduct and all other compliance policies re gifts and entertainment. Entertainment can be OK with in reason - encourage transparency.

# GUIDANCE ON HANDLING WB CASES

## WHAT TO DO

# GUIDANCE ON HANDLING WB CASES

1. Timing of investigation and communication is key
2. Make all efforts to contact WB , but treat him like an informer.
3. If you make promises be sure you can keep them i.e. check your authority
4. In bribery and corruption allegations (most WB complaints) look for good evidence that will stand up in court.



# GUIDANCE ON HANDLING WB CASES

5. Draw up plan but be flexible- list of interviewees, order of interviews, findings (don't miss anything), deal with language difficulties, correlate all sources of evidence.
6. Ensure internal and external reporting is accurate and timely.
7. Follow up on legal/management action.

# GUIDANCE ON HANDLING WB CASES

8. Inform WB of progress, if necessary ( but can be a double edged sword!).
9. Share lessons learned with employees

# THE IMPORTANCE OF WB REPORTS

ACFE 2012 Report to the Nation on Occupational Fraud and Abuse. Methods of fraud discovery :

- 43%** from tip offs (34% in 2006)
- 14% by management review
- 14% by internal audit (21% in 2006)
- 8% by internal controls (19% in 2006)
- 7 % by accident (25% in 2006)
- 3% by external audit (12% in 2006)
- 3% by police
- 8% by other