

India's Whistle Blower Mechanism: Growing Louder by the Day

On February 25, 2020, the Ministry of Corporate Affairs of India released the Companies (Auditor's Report) Order, 2020 ("CARO 2020"), which places additional responsibilities on the statutory auditors of the company with regard to whistle blower complaints.

Under clause number (xi), Fraud Reporting, of CARO 2020, the statutory auditor must comment in the audit report as follows:

a) Whether any fraud by the company or any fraud on the company has been noticed or reported during the year. If yes, the nature and the amount involved is to be indicated.

b) Whether any report under sub-section (12) of section 143 of the Companies Act has been filed by the auditors in Form ADT-4 as prescribed under rule 13 of Companies (Audit and Auditors) Rules, 2014 with the Central Government.

c) Whether the auditor has considered whistle blower complaints, if any have been received throughout the year by the company.

The clause number (xi) (a) stated above was part of the earlier CARO 2016 reporting structure, and clauses (xi) (b) and (xi) (c) were new in CARO 2020. Whilst commenting on the clause (xi) (c), the statutory auditor will need to apply professional scepticism and judgement.

This reporting around whistle blower complaints by the statutory auditors would be applicable with retrospective effect from April 1, 2019. As the saying goes 'Caveat Emptor', this disclosure will help the shareholders, business partners, and bankers to gain insights into the quality of internal controls of the company or any fraudulent activities that may not have been reported.

A whistle blower is an individual that raises an alarm or files a complaint about irregular business practices or fraudulent activities that are taking place in a company. Whistle blowers are either an insider — employee of the company, a director, a shareholder of the company or an outsider to the company such as companies' business partners (vendor or customer), or an auditor of the company.

Considering the new CARO 2020, FTI Consulting highlights best practices surrounding whistle blower mechanisms that could be adopted by companies and experiences gained whilst conducting fact-finding investigations based on whistle blower complaints.

Elements of an Effective Whistle Blower Mechanism

In the 2020 Report to the Nations published by the Association of Fraud Examiners, it states that 'tips' or whistle blower information globally is to be the most effective method of detecting fraud ranging up to approximately 43 percent. Therefore, having a robust vigil or a whistle blower mechanism is key to the success of any organisation.

The Companies Act 2013 mandates the setting up of a vigil mechanism for all the listed companies and such other prescribed companies for their employees and directors to report their genuine concerns regarding any fraudulent activity.

Design and development of the whistle blower mechanism

- The recommended channels of communication for filing complaints could be as follows:
 1. Designated phone lines that are open all the time with a secure voicemail system where the whistle blower can record their complaint. Companies can make use of artificial intelligence tools to record the complaints in an effective way, which would have their own in-built intelligence to answer and ask the complainant questions surrounding the standard details about the complaint, provide procedural clarifications to the whistle blowers, and help record the statement in an effective way.
 2. A designated email address or a web portal is provided where a whistle blower can submit complaints. The designated web portal on the intranet page of the company should have certain mandatory fields to be filled in by the whistle blower, which becomes easier for the designated authority of the company to comprehend the complaint. Often, the subwhistle blower complaint is lost if not drafted properly.
- Access to the whistle blower should be controlled only by the Audit Committee of the company. The committee may in turn delegate the review of the complaint to an internal risk team, or appoint a law firm or a consulting firm to assist in conducting a fact review.

- In certain companies, the process of reviewing the complaints received under the whistle blower policy is outsourced to maintain independence.

Awareness of the whistle blower policy

- The awareness of the whistle blower policy across the company is important. The policy should preferably be placed prominently on the landing page of the company's website and well documented on the company's intranet. In addition, the policy should be visible throughout the company's corridors including all remote locations where there are operations.
- To ensure widespread awareness of the policy, the company should include a course about the policy in the compulsory annual learning and development courses. In the situation where a company does not have a formal training programme, the whistle blower policy can be included in quarterly emails as well as delivered to new joiners during initiation.

Contents of the whistle blower policy

- The whistle blower policy should include details of the procedures and process of investigating the complaints followed by the Audit Committee of the company subject to them finding the concern and compliant genuine in nature.
- Furthermore, the whistle blower policy should clearly define the rights and duties of the whistle blower and procedures surrounding filing a complaint.

Protecting and incentivising the whistle blower

- Currently in India, the 'Whistle Blowers Protection Act, 2014' seeks to protect whistle blowers making a public interest disclosure related to an act of corruption, misuse of power, or criminal offense by a public servant. The law does not extend its jurisdiction to the private sector.
- In India, the majority of employees or business partners are reluctant to file a complaint under the whistle blower policy mainly due to fear of losing their jobs, victimisation by senior management or the perception that the fraudster is a close aid of senior management. The whistle blower policy should give employees the confidence that all whistle blower complaints are handled carefully and discretely by the Audit Committee or such authority deemed responsible by the Board of Directors of the company and an independent review around the facts mentioned in the complaint letter would be conducted. Furthermore,

the whistle blowers should be assured that their job, reputation and safety are not in jeopardy.

- Incentivising the whistle blower could also work as an effective way to encourage individuals to file a valid complaint. The Indian capital market regulator, Securities Exchange Board of India (SEBI) has announced a reward of INR 10 million for informers of insider trading, subject to the prescribed conditions.

Periodic review and assessment:

- A review of the whistle blower policy should be conducted on a periodic basis by the company, even by appointing a third-party risk consultant.

Illustrative Best Practises for Dealing with Whistle Blower Complaints

- At the outset, the Audit Committee classifies all complaints as either genuine or dubious. Often invalid complaints are filed by disgruntled employees or employees with a personal agenda. Once a complaint is identified as valid, the Audit Committee Chairman or the deemed designated authority at the company should carry out the initial communication to understand the complaint and give them confidence, showcasing gratitude for coming forward to register a complaint.
- If the whistle blower decides to reveal their identity, then detailed information gathering sessions can be conducted by the designated authority of the company along with the company's counsel, a human resources representative, the investigating team and other team members that are deemed important.
- Many whistle blower complaints are filed as 'anonymous'. If the whistle blower refuses to reveal their identity, the company authorities must conduct their independent review based on the available information. Many companies disregard cases where the whistle blower's identify is not known; however,

we advise that the baseline review of the complaint be conducted to determine the merit.

- The whistle blower should not be privy to the investigation conducted by the Audit Committee or the report submitted thereof.
- The Audit Committee should identify and deploy the right inhouse team including a member from legal, internal audit, human resources and/or outsourced individuals to conduct the investigation into the whistle blower complaint. The Audit Committee should review the status of the reports and work status in their periodic meetings.
- All the whistle blower complaints received by the company during the year should be documented in detail, including the action taken, and their redressals. The Audit Committee should not ignore any compliant based on the level of materiality of loss to the company or the level of the employee mentioned in the letter.

The Way Forward

In recent times, where large corporate scams have become far too common, the latest amendment in CARO 2020 will help improve governance and enhance transparency. Such amendments will cause a surge in the number of cases being investigated at the behest of the Audit Committee. Moving forward, there will be greater emphasis placed on internal controls and fraud fighting at a company and board level. These increased requirements for disclosure will lead to an improvement in the standards of corporate governance and a cleaner business environment.

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