





Whistleblowing's Tangled Web

Whistleblowing has reached a new level of intensity with the passage of the Dodd-Frank Act in the US. Asian corporate treasurers have a lot to be worried about. By Nick Lord

Many people suffer from arachnophobia – a deep terror of spiders. For corporate executives, one eight-legged beastie in particular fills them with deep fear and loathing. Bradley Birkenfeld was given the nickname Tarantula by the US authorities when he blew the whistle on a tax evasion scheme cooked up by Swiss bank UBS. Birkenfeld has spent ten months in prison for his own role in that scheme.

And yet under the terms of the newly-passed Dodd-Frank Act, he was entitled to between a 10% and 30% stake of the fine levied on the firm against which he ratted. Around the world, people awoke to a dangerous new reality: blowing the whistle on the company for which you work, could be vastly more lucrative than years spent toiling for a salary. A spider's web has been set for the unwary.

The Dodd-Frank legislation provides a



ETJ – EXTRATERRITORIAL JURISDICTION

On September 13, 2012, US Representative Lynn Woolsey introduced a bill into the US Congress which would extend the Sarbanes-Oxley whistleblower anti retaliation provision to private sector employees outside the US. US courts had previously decided that the relevant law had lacked extra territorial effect. In one case known as Asadi versus GE Energy, a Texas District Court found that the Sarbanes-Oxley law did not cover Khaled Assadi who had worked with the Iraqi government to secure contracts for GE Energy. But with the new bill in place, such situations would fall under the Sarbanes-Oxley protection regime.

new level of incentivisation for whistleblowers. They were previously merely offered protection from retaliation and abuse under the 2002 Sarbanes-Oxley Act.

EXTRATERRITORIALITY – IT COULD BE YOU

For corporate treasurers in Asia, it is a subject that needs to be taken seriously. “Whistleblowing legislation in Asia is not as sophisticated or as robust as it is in the US, but even so MNCs here are aware of Dodd-Frank, for instance, and take whistleblowing seriously,” says Andrew Dale, a partner at Orrick, Herrington and Sutcliffe in Hong Kong.

Key to the consideration is whether companies in Asia actually come under US jurisdiction. According to lawyers, a listing in the US, even a depositary receipt programme would definitely bring a company under US regulatory authority. Conducting illicit transactions in US dollars also technically brings a foreign

company under US jurisdiction. Having US operations also brings those transactions under US jurisdiction. It is a wide net that will capture many of Asia’s leading companies.

Moreover, even if you are not in any way under US jurisdiction, whistleblowers themselves can give evidence to the US Securities and Exchange Commission (SEC) about a company that is and can receive the full protection and rewards established in the US system.

“From an Asian perspective, if you have information that you would like to give the SEC on a confidential basis about a company that is subject to the SEC jurisdiction, then under new US legislation you may be entitled to a reward of between 10% and 30% of the fine,” says Jeremy Cole, partner and head of the investigations team at Hogan Lovells in London. “The protection of whistleblowers is extended to include all the subsidiaries and affiliates of the company in question,



whether they are incorporated in the US or not.”

Asian companies have long been wary of falling under excessive US regulatory zeal and have taken steps to minimise their involvement. But with the incentives now on offer, many may find themselves pulled into these situations without recognising it. Moreover, they are not entirely safe from whistleblowers in their home markets. Many countries in Asia now have legislation in place – notably Japan and Hong Kong. And experts predict that domestic cases are on the rise, although exact numbers are hard to come by.

“Whistleblowing is also commonplace in Asia, in particular within multi-nationals operating here which have designated reporting hotlines and procedures in place,” says Colum Bancroft at Kroll Advisory Solutions in Hong Kong. “I am not aware of any programme in Asia similar to that implemented under Dodd-Frank in the US, although specific regulatory authorities such as the ICAC in Hong Kong encourage proactive reporting of suspected wrongdoing.”

Lawyers agree that the level of whistleblowing in Asia is on the rise, driven by a clamp down on business practices that were commonplace.

“Prosecutors are much more active in Asia at the moment,” says Cole. “In particular, there is a much greater focus on targeting corrupt activity.”

Cole points out that competitors can blow the whistle on an Asian company to the US authorities if they feel a piece of business was won corruptly. This will radically alter business practices in some countries and sectors. “Even if you do not have US operations, Asian companies’



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ASIAN CORPORATE GOVERNANCE STANDARDS (%)

Country	Total	CG Rules and practices	Enforcement	Political and regulatory	IGAAP	CG culture
1. Singapore	69	68	64	73	87	54
2. Hong Kong	66	62	68	71	75	53
3. Thailand	58	62	44	54	80	50
4. = Japan	55	45	57	52	70	53
4. = Malaysia	55	52	39	63	80	38
6. Taiwan	53	50	35	56	77	46
7. India	51	49	42	56	63	43
8. Korea	49	43	39	56	75	34
9. China	45	43	33	46	70	30
10. Philippines	41	35	25	44	73	29
11. Indonesia	37	35	22	33	62	33

Source: Asian Corporate Governance Association

business practices might come to the surface in ways they would not have done just five years ago,” he adds.

Apart from corruption and tax evasion, the two other big areas in which whistleblowers could prosper are sanctions and environmental crimes. US authorities have taken a very hard line on both in recent years. Banks in particular

need to be very wary of breaking sanctions on doing business with Iran and North Korea, as seen by the huge fines levied against Standard Chartered.

General levels of corporate governance in Asia are also under the spotlight. Last month a report by CLSA and the Asian Corporate Governance Association examined 864 listed Asian companies

in 11 countries, and it found a generally weak and weakening picture of corporate governance.

Not having an independent audit committee or independent boards are not crimes about which whistleblowers can tell the authorities. But they do indicate a general governance environment in which nefarious activities can take place. But now prosecutors globally are going after bad corporate behaviour and have got the protections and rewards in place to create a fifth column, from within the corporate ranks.

STAFF LOYALTY

From an Asian perspective, this could be a wrenching change. Culturally, behaviours within companies in Asia are very different from those in the West. Family firms create a very strong sense of patronage within themselves that makes them incredibly cohesive. Foreign firms operating in Asia also report that the loyalty of staff is not to the company itself, but to their line managers and bosses. These cultural norms create a febrile situation in which whistleblowing can prosper.

Companies should therefore take steps to protect themselves from potential abuse



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Colum Bancroft, Kroll

from this new system.

“Companies should have a robust compliance system that is actively enforced and constantly updated and reviewed,” says Dale. “Companies should also listen to their employees because in many whistleblowing complaints, it has come out that employees had reported the wrongdoing internally but nothing had been done about it.”

Others say that having the right attitude

towards whistleblowers is as important as having systems and procedures. “First of all, companies shouldn’t take a negative stance towards whistleblowers,” says Bancroft. “Rather, it is important that the company knows how to properly assess and read between the lines when evaluating whether a whistle blowing allegation is genuine or not. If it is genuine, the company should benefit in the long run.”

TOP TIPS – INSTALLING A CULTURE OF HONESTY

It has been said there is no good way of getting a divorce, no good way of dying and there’s no good way of whistleblowing. The same hopefully can’t be said about the capacity of senior management – be it a treasurer, CFO or chief executive – to instill a strong corporate culture that raises awareness of company misconduct and empowers staff to flag it when they see it before whistleblowing becomes necessary. Andrew Dale, partner at Orrick law firm offers up some simple advice on what to do.

1 Culture: The tone from the top can have a strong influence on your employees’ conduct and corporate culture. Consider carefully what you say, how you say it and to whom. Of

course, talking is only half the battle. Live the culture you want your employees to follow.

2 Training: Training needs to be appropriate for the target culture, language and audience. Most of all it needs to be made relevant to and resonate with your employees on a personal level.

3 Pressure: Clearly it is important to set targets and encourage employees to meet and exceed goals. However, excessive focus or pressure to meet a particular metric may cause unintended and expensive consequences.

4 Observation: Make sure you understand exactly what is happening within your business “at the coal

face”. Visit offices, walk the corridors and the factory floors, take the time to listen to your employees. You may be surprised by what you are told.

5 Awareness: Often employees do not question what is outside their own area of responsibility. Assumptions can be made between and within departments that each has done its job properly; even when in fact this appears not to be the case. This allows misconduct to continue unchecked. Break down any unintended silos.

6 Question: Often reports only provide part of the information. Look deeper into the figures. If something seems too good to be true, it probably is. Additionally, what you

cannot see, may come back to bite you. Know the limitations of the processes, procedures and information you receive. Information “loopholes” can be exploited to damaging effect.

7 Action: Do not assume someone is already dealing with a potential issue of which you have been made aware even if it has been reported. Take responsibility to ensure action is being taken.

8 Value: When your in-house legal or compliance team seek further resources for compliance, do not just consider the cost. Is there a value proposition? Can your company use higher standards of quality and integrity as a means to retain and win new business?



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Having created a culture within the company that encourages whistleblowers to come forward internally rather than go straight to the authorities, companies need to know what to look for, so as to be on the front foot in dealing with any whistleblowing situation should it arise.

However, there's no easy way to spot a potential whistleblower. Certainly, anyone who knows about illegal corporate behaviour has the potential to be one. But looking at who has blown the whistle in previous circumstances shows that they can range from the CEO down to the lowliest employee.

Michael Woodford, the ex-CEO of Olympus in Japan, exposed his own company last year. A new support group in the UK called Whistleblowers UK comprises people who have told the authorities of malfeasance in their own companies. The people involved range from a nurse working at a care home, to a contractor at a defence company and to two senior bankers, one the head of regulatory risk at HBOS and one whose job it was to assess potential money laundering at US bank Wachovia.

The similarity is that they were all motivated by a sense of injustice and a desire to do the right thing. “You cannot stereotype what a whistleblower looks like,” says Dale. “It can be anyone in a company from the person at the very top right down to the bottom.”

A GAME FOR THE LAWYERS

But all of those cases had come to light before the introduction of serious financial reward for whistleblowing. And experts feel that could change everything. There are already law firms springing up in the

US which only work on whistleblowing cases, in many instances on a no win, no fee basis. Indeed, Dodd-Frank has a contingency fee clause specifically designed to encourage this kind of activity. And where the US leads, Asia is sure to follow.

The law needs whistleblowers to come forward, as the lawyers themselves are not allowed to start the proceedings. They need clients such as Tarantula, to be willing to take the big risks in order to reap the big rewards. “Such huge whistleblowing bounties [as Birkenfeld got] are not an everyday occurrence,” says Dale. “Even if there is specific legislation in place, it is still a huge step for an employee to whistleblow on his or her employer, particularly externally.”

There is also a much greater threat of frivolous cases of individuals motivated not by the desire to do the right thing, but exactly the opposite. On top of the monetary incentive, they might want to extract revenge or settle an old score. Whistleblowing could even come from a particularly ruthless competitor. “A whistleblower’s motivation for coming forward may also be driven by professional jealousy or other personal motives, which also need to be carefully considered when assessing the validity of the allegations being made,” says Bancroft.

It is a tangled web. There are competing rules in different jurisdictions, offering various levels of protection and reward for people motivated by a number of differing forces. It is a whole new category of risk, which corporate treasurers and financial chiefs will find very difficult to hedge. The only sure fire way not to get caught in the trap? Don't do anything wrong. ■

SECTOR FOCUS

There are certain sectors in which companies operate that are particularly subject to whistleblowing risk. These are industries that have traditionally been hotbeds for particular crimes. When it comes to corruption, companies in the defence, energy, extractive industries and pharmaceutical sectors will be very aware of the risks they face. Banks need to be very worried about sanctions busting, even inadvertently. Many manufacturing companies will also need to be wary of their supply chains breaking environmental rules.

“Whistleblowing isn't restricted to specific sectors, although particular issues of concern may be more likely to arise in certain industries than others: intellectual property infringement in the pharmaceutical and electronics industries; bribery and corruption in industries requiring a high degree of governmental licensing and approvals.” says Colum Bancroft at Kroll Advisory Solutions. “Procurement fraud - involving conflict of interest issues, kickbacks - is the most common type of issues that we come across, which is not necessarily sector-specific.”

