

## **PREVENTION, CURE OR INACTION?**

‘Olympus Corporation faces setback in the Court’ reported Economic Times in its edition published on June 30, 2012. Olympus Corporation lost a court battle against an employee, Mr. Masaharu Hamada who sued the Japanese camera maker for retaliating against him after he complained about the unethical conduct of his boss.

Similarly in the GlaxoSmithKline case where company's improper marketing practices extended across a wide range of its prescription drug portfolio, the whistleblowers shared lot of invaluable insider information with the Government that led to a civil settlement in July, 2012.

The concept of whistle blowing evolved from the ‘Qui Tam’ philosophy. History finds the genesis of Qui Tam provisions in medieval England, during a time when no organized police force existed to enforce laws. English common law adopted various Qui Tam provisions in an attempt to provide for the enforcement of the law by those who suffered injury as a result of violations of the law. In effect, Qui Tam provisions allowed, and in fact encouraged private parties to act as policemen. The government paid a reward or bounty to the private party to make the effort worthwhile, and to give incentives to other individuals to bring similar suits.

Now-a-days many companies have whistleblower policies in place wherein a Compliance Officer is appointed. The employees are supposed to approach the Compliance Officer with their complaints. The Compliance Officer then takes up the matters with the management and the Board of the Company. By and large the first step of the whistleblower is to inform the malpractices through the internal communication system within the organisation.

However, there may be strong repercussions of this on a whistleblower. Many a time a feeling of mistrust is developed towards the employee. He may be subjected to resentment and hostility from the peers and superiors. At times pressure techniques may be used to suppress the employee by asking him to stay quiet putting his job at stake. Sometimes employees even lose their job in this process or even if they are retained they may face difficulty in future promotions or could face demotion.

Inspite of the consequences, in a few cases, like the ones reported above, the employee gathers courage to go further and make these problems

public by approaching the media or the authorities such as regulators or courts of law. Antagonising the whistleblower is certainly not healthy for the growth of the company.

Installation of a whistleblower policy and its execution is the responsibility of the Company Secretary in companies. The Company secretary is the Compliance Officer, the 'Ombudsman'. He/she is the one who ensures that best management practices and work ethics are followed towards wealth creation in the company. Merely installing the policy may not prove to be effective and hence may not give tangible results. The term 'execution' has a very wide scope. Whistleblowing should not be undertaken impulsively. The whistleblower must bear in mind that his/her action to blow the whistle will have dire consequences on the Company and its officers and therefore a strong moral justification must exist for blowing the whistle. This calls for training the executives, employees and trade unions on the various aspects of the policy so that the whistleblower is in a position to evaluate whether there is a situation to blow the whistle. The parameters for evaluation could be:

- Grave injustice or wrongdoing is occurring.
- Presence of reasonable evidence to support the complaint.
- Degree of intensity of the unethical practice or behaviour.
- Primary loyalty of the whistleblower is to the organization in which he/she is employed unless other compelling moral reasons override this loyalty.
- Presence of a prima-facie case where blowing the whistle will cause more good than harm to the Company.

The next pre-requisite for execution of the policy is the company culture. Such a policy cannot thrive in absence of a conducive culture where the employees are silent employees. The role of the Compliance Officer is further enhanced with the responsibility of promoting such organisational culture of mutual trust between the management and the employees in which individuals take the responsibility for communicating problems to management before those problems get out of hand.

What could be the modus operandi on receipt of a complaint? A whistleblower wanting to disclose certain unethical practices should not be shunned because:

- firstly he/she may be having a valid point towards the interest of the Company and its management;
- secondly if his/her complaint is not taken to the logical conclusion wherein he is satisfied that some disciplinary action to curb the

unethical practices is taken, he may be tempted to divulge the information to outsiders.

This is a tough situation to handle because it not only tarnishes the image of the company but also may burden the company with stiff financial penalties by way of damages if the victim approaches the authorities.

In such situations the Company Secretary must act as a mediator between employees and the Board of Directors as far as unethical practices and its reporting are concerned. When any employee approaches with a complaint of unethical practices being carried out within the Company, the Company Secretary as an ombudsman must intervene and, if satisfied of the merits of the case, put it before the management and the Board counselling them to keep a positive approach towards the complaint. The management and the Board must also take responsibility for honest investigation of allegations and for the proper treatment of informers. This will only help to win the faith of the employee towards the management and the Board of his/her company. In such a case the employee will willingly cooperate in the investigation process and will not be urged to make the matter public.

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All in all the Company Secretary plays a crucial role in keeping the conscience of the Company and its management awake and guiding them to making correct and ethical decisions.

However, sometimes there may be situations wherein the top management of the Company is adamant and not paying heed to the views of the Compliance Officer. In such cases the Compliance Officer may not be in a position to act as a conscience keeper. Ethically and practically as well, it may be a wise decision to bring the information in the public domain. One cannot overlook the fact that the Company Secretary is accountable to instil and execute corporate governance and ethical practices in a company. Turning a blind eye and avoiding reporting the unethical practices may have serious repercussions on him/her. He/she may be made responsible for the wrongdoings by government officials and consequent charges may follow. Additionally, it will taint his/her image.

Having said this, one cannot forget the fact that there are no stringent laws for the protection of whistleblowers in India and corporate terrorism against honest employees is on the rise. A genuine whistleblower may be threatened and terrorised by the company management to keep silent on voicing his/her concerns at the cost of his/her career, job, family, and

their lives, etc. There have been a number of whistleblower cases in India where the whistleblower was almost compelled to go further and make the information public due to failure of the internal reporting system to combat the unethical practices. One such case was of Mr. V. Saseendran, Company Secretary in Malabar Cements Limited (public-sector unit). He was a key witness in about four vigilance cases against the Company. Shocking but true is the fact that he died along with his two sons and the government has conveniently claimed his death to be a suicide.

With this background, it is imperative and urgent to have laws protecting whistleblowers in India. The Whistleblowers' Protection Bill, 2011 passed in the Lok Sabha is awaiting clearance in the Rajya Sabha. The United States of America already has several such laws – The False Claims Act (revised in 1986), Lloyd – La Follette Act, 1912, Dodd – Frank Wall Street Reform and Consumer Protection Act, 2010 and such others. These laws even promise a certain percentage of the money recovered or the damages to the whistleblower. The United Kingdom and Australia also have legislations in place for protection of whistleblowers.

Unless stringent laws are enforced the future of genuine whistleblowers is rather bleak. Absence of conducive corporate culture and protection laws for whistleblowers will only discourage the process of good corporate governance.

Legislation combined with right attitude of the company management will take the process of whistleblowing further. Having a plan for handling whistleblowing situations is a way of making sure that managers make the right decisions even under the inevitable pressure of ensuing crises. Essentially, the success of whistleblowing to a very large extent depends on the receptivity of the top management and the good spirit with which its executives deal with the disclosures of whistleblowing to the advantage of the organization.

Whistleblowing is not a career in itself. Most of the business dealings are genuine and above-board. However when one stumbles across some wrong-doing, a dilemma arises. Unlike a traffic cop who hides behind a kiosk and then traps those who jump the signal, a Company Secretary should try to prevent a wrong act rather than allowing it to take place and then blowing a whistle. Prevention is indeed better than cure, but cure is still preferable to letting the wound fester.

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