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WHISTLEBLOWERS REWARDS: USING UNITED STATES QUI TAM PROVISIONS IN MALAYSIA

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Abstract

The issue of whistleblowing is now a very relevant issue, as it plays a very important role in enhancing and improving governance in institutions. Corporations all around the world now strive to practice good governance, as it promotes excellent business relationships, as well as avoiding any future liability that could arise from any negligent governing in the corporation. However, it is now no longer enough to talk about whistleblowing in relation to good corporate governance; whistleblowing must be used to promote a wider social good as well. This is where whistleblowers would come in, to provide the much needed impetus to combat various corporate misconducts. This paper will discuss those issues, along with the introduction of rewards by the Malaysian government to whistleblowers who disclose any wrongdoings. This paper will also discourse how qui tam provisions in the US can play an important role in helping to enhance whistleblowing in Malaysia.

Keywords: Whistleblowing, corporations, corporate, governance, qui tam.

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1. Introduction

There is no set definition of whistleblowing, but perhaps the most widely accepted definition, and possibly the most used one, would be that of Near and Miceli, (1985). Near and Miceli defined whistleblowing as "the disclosure by a current or former organization member of illegal, inefficient, or unethical practices in an organization to persons or parties who have the power or resources to take action" (Near & Miceli, 1985). It could be conceived from here that Near and Miceli were referring to whistleblowers as the employees of an organization, but in recent times, this definition has been broadened to include whistleblowers from outside corporations, such as consumers and clients as well (Brancaccio, 2010).

Bok defines whistleblowers as individuals who "sound an alarm from within the very organization in which they work, aiming to spotlight neglect or abuses that threaten the public interests" (Bok, 1980), while Alford defines a whistleblower as "one who (1) acts to prevent harm to others, not to him or herself, (2) trying first to rectify the situation within the framework provided by the organization, (3) while possessing evidence that would convince a reasonable person" (Alford, 2002). In both definitions, emphasis was given on the fact that the disclosure together with the whistleblower should first be addressed from within the company itself.

However, there are some writers who feel that whistleblowers who had reported wrongdoing within the organization, but informed no outside authority was not really a whistleblower (Farrell & Peterson, 1982).

Johnson disagrees, stating that by this definition, it would exclude some of history's most famous whistleblowers, such as Cooper of WorldCom, Rowley of the FBI, and Watkins of Enron, and whom Time Magazine honored as the "Persons of the Year". All three whistleblowers reported their concerns only to insiders, and it was only through other means that external parties became aware of their expressed concerns and asked for elaboration. Their information eventually was made public to outsiders, so perhaps this distinction is not so important after all (Miceli & Near, 2005). This goes to show that the internal mechanism within a company with regards to disclosures and whistleblowing are woefully inadequate.

2. Problem Statement

To forge ahead and make disclosures about misconduct is never easy. Johnson stresses that the most important issue that must be remembered is that whistleblowers act "with the intention of making information public". Johnson further highlights that the whistleblower is a current or former employee, not an outsider (Johnson, 2003). Johnson is not alone in his view. Jubb argued that whistleblowing must be distinguished from "informing" but did not really define what is "informing" (Jubb, 1999). Like Johnson, Jubb requires that reports must be "public" to count as whistleblowing (Jubb, 1999).

Jubb further points out that the whistleblower is an insider 'who has or had privileged access to data or information of an organization' (1999). The whistleblower is then a member or former member of the organization with which wrongdoing is exposed. The fact that the whistleblower is an insider is a vital element with regards to the perception of betrayal. This is because only an insider can betray, or to put it in a different way, violate loyalty and trust within the company (Ben-Yehuda, 2001).

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Whistleblowing has been thought to be the ultimate betrayal to the company. The fundamental nature of this dilemma is demonstrated vividly by Ben-Yehuda, who states; "The organization sees whistleblowing as betraying of interests of the organization, violating the rules of hierarchy, bypassing authority, squealing, damaging the reputation of the organization, acting in a hostile manner toward the organization, poisoning the atmosphere, and supplanting cooperation with suspicion. Whistleblowers, on the other hand, tend to justify their activities in such terms as doing one's job, being faithful to the community, revealing the truth, and doing something that is in the best interests of the organization" (Ben-Yehuda, 2001).

Ben-Yehuda further defines betrayal as the systematic and planned violation of the values of trust and loyalty within the company (Ben-Yehuda, 2001). On the individual level, it implies the corruption of 'an imagined consensus regarding shared interests and personal identities', while on the collective level, it taints the 'sense of imagined community and of collective memories and national identities' (Ben-Yehuda, 2001). When trust disappears altogether (Sztompka, 2006), whistleblowers move from being loyal employees to people who feel that the organization has betrayed them. This means that they distrust the organization and do not recognize the authority of the organization. Whistleblowers have now become 'an enemy within' (Davis, 1989), and in this case are often treated badly by both fellow employees and the company itself.

3. Research Questions

(a) Are whistleblowers protected when giving disclosures?

(b) How are whistleblowers perceived in institutions?

4. Purpose of the Study

Whistleblowers that make disclosures often put their careers and livelihoods at risk, particularly if legislative protection is weak or lacking. When in all good conscience whistleblowers reveal corruption, dishonesty or improper conduct in an organisation, they do us all a service. Often the only way evidence of improper or corrupt conduct can be brought to the attention of proper authorities is by employees 'blowing the whistle.' However, such action can lead to victimisation and protection is needed so that if a person is bullied, demoted and even sacked because they made a genuine and warranted disclosure, then they need processes that allow for investigation, and restitution for damages. People should be encouraged to draw attention to wrongdoing, not punished. They should not have to risk their livelihoods, or endure personal suffering. Fortunately, people of conscience, with high moral regard continued to make disclosures in the public interest, even before there were better disclosure systems or better legal protection.

For instance, the first law that specifically protected whistleblowers were the US False Claims Act 1863 (revised in 1986), which tried to combat fraud from suppliers during the Civil War. The Act encourages whistleblowers to blow the whistle by promising them a percentage of the money recovered as well as damages won by the government in addition to protecting them from wrongful dismissal. This is akin to the qui tam provision that is currently in place in the US.

In 1989, The Whistleblower Protection Act was enacted in the US. It is a federal law that protects federal whistleblowers who work for the government and report agency misconduct. A federal agency

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violates the Act if agency authorities take or threaten to take retaliatory action against any employee or applicant because of disclosure of information by that employee or applicant. Whistleblowers may file complaints that they reasonably believe shows violation of laws, rules or regulations, abuse of authority or a substantial danger to society. This Act, however, has come under criticism for not enforcing whistleblowers protection enough, as in a divisive 2006 case, the US Supreme Court ruled (Garcetti & Ceballos, 2005) that government employees do not have protection from retaliation by their employers under the Constitution if they inform while in the course of doing their official duties (U.S. Congress, 2010).

Fortunately, in recent times, the US has enacted several notable laws, particularly SOX 2002, the Dodd-Frank 2010 and the most significant and current, the Whistleblower Protection Enhancement Act 2012 which was signed into law by President Obama on November 27, 2012. This Act injected a much-needed shot in the arm for whistleblower protection, enhancing existing protections, rather than introducing new ones. The Act further strengthens anti-retaliation rights given to federal employees under the previous Whistleblower Protection Act 1989. These Acts were all put in place to encourage and protect whistleblowing in a variety of areas, in addition to increasing the role of whistleblowers in promoting good corporate governance and combating corruption.

SOX were conceived at a time when the issue of wrongful conduct by big and powerful corporations was at its peak. Furthermore, in the middle of all these turbulences, the roles of the whistleblowers were instrumental in bringing to light the corrupt practices of those corporations. In fact, the language of SOX leaves no doubt that USA intended whistleblowing to be an integral part of its enforcement mechanisms. The Act attempted to encourage and protect whistleblowers in a variety of ways, including providing for anonymous whistleblowing, establishing criminal penalties for retaliation against whistleblowers, and clearly defining whistleblowing channels (Dworkin, 2007).

In tandem with SOX's function, which was essentially to prevent another corporate crisis, it was only a matter of time before Congress passed another Act to regulate and control the financial markets. To that end, the Dodd-Frank Wall Street Reform and Consumer Protection Act were passed in 2010. In simple terms, Dodd-Frank is a law that places major regulations on the financial industry. Dodd-Frank is also geared toward protecting consumers with rules like keeping borrowers from abusive lending and mortgage practices by banks. It became the law of the land in 2010 and was named after Senator Christopher J. Dodd and U.S. Representative Barney Frank, who were the sponsors of the legislation (Koba, 2012).

In the two years since USA passed the far-reaching regulatory overhaul, lawmakers have railed against the law for either not going far enough to reform Wall Street or being too burdensome to the industry (Douglas, 2013). Some writers have gone even further, going as far as labeling the Dodd-Frank as autocratic and totalitarian (Simon, 2012). By creating new agencies like the Bureau of Consumer Financial Protection, along with expanding the role of existing entities like the Securities and Exchange Commission and the Federal Reserve, Dodd-Frank puts the nation's financial health in the hands of regulators while providing little clarity for the rules they enforce. There was this need to do something, and the USA was more concerned about doing something, rather than about doing something right (Cordell, 2013). It will be interesting years ahead for America in the wake of this legislation, and whether or not the Dodd-Frank will be effective in curbing further corporate chaos, only time will tell.

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Nevertheless, despite the Act's shortcomings, one particular area must be lauded, in that the Act allows reward payouts to whistleblowers that provide information leading to successful convictions. Section 922 states;

(a) IN GENERAL - The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 21E the following:

''SEC.21F.SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.

''(b) DEFINITIONS - In this section the following definitions shall apply:

''(1) COVERED JUDICIAL OR ADMINISTRATIVE ACTION—The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

''(2) FUND - The term 'Fund' means the Securities and Exchange Commission Investor Protection Fund.

In addition to whistleblower rules, the Dodd-Frank Act compelled the SEC to create an Office of the Whistleblower that works with whistleblowers, handles their tips and complaints, and helps the SEC determine the awards for each whistleblower (U.S. Securities and Exchange Commission, 2011). The Investor Protection Fund will be used to pay awards to eligible whistleblowers. For whistleblowers to be considered for an award, the SEC's rules require that a whistleblower must voluntarily provide the SEC with original and independent information, information that is not obtained from any other source, including the media. Additionally, that information must lead to a judicial or administrative action in which the SEC obtains monetary sanctions exceeding $1 million. The reward amount that is to be paid will be between 10-30 percent in total of what has been recovered by the SEC. The amount payable to the whistleblower is determined at the discretion of the Commission, and it would also have to take into account the significance of the information and the degree of assistance provided by the whistleblower. A whistleblower is however, not entitled to any reward if he is an employee of the Commission or any other organization relating to law enforcement, where he is a convicted criminal or if he gained the information through the performance of an audit of financial statements required under the securities laws (Dodd-Frank Act, 2010).

Section 922 of the Dodd-Frank Act further prohibits any retaliation taken against an employee for disclosing information to the Commission, initiating, testifying or assisting in any investigation or judicial or administrative action of the Commission or in making disclosure as required or protected under SOX 2002 or relating to any securities law within the authority of the Commission. The whistleblower is also entitled to take legal action against the employer as a result of any retaliation suffered with regard to the earlier mentioned protected activities. This gives whistleblowers added security. Not only are they protected from detrimental actions, but they would also be rewarded as a result of them blowing the whistle. The Act also mentions certain issues, such as whether the whistleblowers' complaints are being investigated fast enough, are the rewards adequate in exchange for disclosures and whether the amount of rewards would be so high that it would induce some to make false disclosures.

The False Claims Act, 31 U.S.C. S 3729(a) ("FCA") provides a cause of action against "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval, or . . . knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim." (False Claims Act, 1986). The Act's scienter requirement defines "knowing" and

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"knowingly" to mean that a person has "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information" (United States Supreme Court, 2016). The Act defines "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property (False Claims Act, 1986). Persons who are in violation of the Act are liable for treble damages (three times the actual damages which the government sustains (False Claims Act, 1986). First, the government may choose to intervene and take over the lawsuit. This will result in the relator receiving 15-25% of the recovered funds. Second, if the government chooses not to intervene, the relator can continue the lawsuit independently and collect between 25-30% of the recoveries (McDermott, Barker, Lewis, & Bockius, 2018).

5. Research Methods

This study will employ several methodologies that are inter-related.

A jurisprudential analysis would involve an examination of the jurisprudential beginning for whistleblowing. The application of whistleblowing to other specific areas can only be justified on a jurisprudential basis, in that by using case law as the basis for the doctrinal analysis.

Legislations and judicial decisions from various countries such as the United Kingdom, United States, and Malaysia will also be studied, while the doctrine of binding precedent in countries such as the United Kingdom, United States and Malaysia will be examined. Secondary sources would consist of legal writings and journalistic articles by academicians and scholars.

6. Findings

For example, due to the massive losses that the government has suffered, according to data released by the US Department of Justice in 2007, disclosures by qui tam relators have led to recoveries of $1.45 billion in fiscal year 2007. The False Claims Act which was first passed in 1863, includes an ancient legal device called a "qui tam" provision (US Department of Justice, 2007), Qui tam is a term derived from the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur", which means "who pursues this action on our Lord the King's behalf as well as his own" (Black, 1999). False claims cost the government billions in losses, while the false claims that are submitted vary. A few of them would include, billing twice for the same work, false negotiation including defective pricing and bid rigging (U. S. Court, 1981).

The FCA sets out civil and criminal penalties for persons who knowingly submit false claims to the government. This provision allows a private person, known as a "relator," to bring a lawsuit on behalf of the United States, where the private person has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. The relator need not have been personally harmed by the defendants or their conduct (Calcagno & Associates, 2011).

The act of whistleblowing need not only be confined to discovering misconducts in corporations, but may encompass other areas as well. To date, other areas where whistleblowing has been shown to be particularly beneficial is in the medical arena (Burkin & Kleiner, 1998). Whistleblowing can be used to uncover unethical medical practices and safeguard patients' rights. Moreover, as awareness on the

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importance of whistleblowing increases, it would inevitably spread to the workplace as well, in the form of corporate policies (Barnett, Cochran, & Taylor, 1993) which would later lead to further implementations of such policies.

Eaton and Akers further go on to illustrate that whistleblowing can be defined in a number of ways. They argued that whistleblowing could involve two ways. The act of reporting any wrongdoing within an organization could be done either through internal or external parties. Internal whistleblowing entails reporting the information to a source within the organization itself, either through specific officers or human resource managers. Meanwhile, external whistleblowing occurs when the whistleblower takes the information outside the organization, such as to the media or regulators. Establishment of a clear and specific definition of whistleblowing itself should be a fundamental component of every whistleblower policy, so as to avoid any unwanted confusion or misunderstandings (Eaton & Akers, 2007).

The WPA 2010 defines a whistleblower as 'any person who makes a disclosure of improper conduct to the enforcement agency under section 6'. Section 2 defines improper conduct, the subject matter of the disclosure, is defined as 'any conduct which if proved, constitutes a disciplinary offence or a criminal offence'. "A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency under section 6, be conferred with whistleblower protection under this Act as follows; (a) Protection of confidential information; (b) Immunity from civil and criminal action; and (c) Protection against detrimental action".

As time goes by, governments are increasingly relying on whistleblowers to provide information about any wrongdoings or misconducts. This reliance is not just reflected in statutes promising protection to whistleblowers, but also the promise of financial incentives and rewards. In Malaysia, sec 26 of WPA 2010 deals with any and all rewards regarding whistleblowing disclosures. Sec 26 states that; 'The enforcement agency may order such rewards as it deems fit to be paid to the whistleblower for; (a) any disclosure of improper conduct; or (b) any complaint of detrimental action in reprisal for a disclosure of improper conduct, which leads to the detection of cases on improper conduct or detrimental action or prosecution of the person against whom the disclosure of improper conduct was made or the person who commits the detrimental action'. However, unlike the qui tam provisions in the USA, which offers 10%-30% of the amount of an effective conviction, WPA 2010 does not state the amount, nor the requirement as to whether the disclosure leads to a successful prosecution or not. Sec 26 seems to merely imply that a reward may be given, as long there is a disclosure of that improper conduct.

Another pressing issue that could arise in relation to rewards in whistleblowing is the potential for untrue disclosures. If the financial incentives are high, there could be pockets of information that may be revealed to be false. While monetary rewards can compensate for retaliation damages and foster whistleblowing, increasingly high payments can come at the cost of fabricated accusations. Not only will this waste the time of the authorities, but will also detract the efforts of investigating actual and honest disclosures.

It would be interesting to note however, that Malaysia provides some measure of protection against this, which comes in the form of sec 11 (1) (b) & (c) WPA 2010. The sections states; 'The enforcement agency shall revoke the whistleblower protection conferred under section 7 if it is of the opinion, based on its investigation or in the course of its investigation that; (b) the whistleblower wilfully made in his

disclosure of improper conduct a material statement which he knew or believed to be false or did not believe to be true; (c) the disclosure of improper conduct is frivolous or vexatious'.

7. Conclusion

Since the development of the idea of whistleblowing, more companies and governments are taking a serious view of it. Many countries, including Malaysia, have adapted the idea of whistleblowing and have also made significant changes to their law to achieve this end, since whistleblowing by its very nature involves significant legal and ethical issues. In respect of public awareness towards corporate wrongdoing and misconducts, we have seen how whistleblowing has contributed towards the phenomenon of both, of course not without so much pain and suffering by the whistleblowers, as clearly illustrated by some landmark anecdotes above. Once whistleblowers decide to blow the whistle, it can be an onerous path to tread. As such, by offering rewards to whistleblowers, this can make the pill of potential detrimental actions that could occur much easier to swallow. Whistleblowing rewards are more than mere compensations, it also offers a type of justification to whistleblowers that their efforts are valued, and most importantly, appreciated by those that matter.

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