

# Whistleblowing in China and the United States

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Recent events in China underscore the importance of dealing effectively with whistleblowers.

The Chinese Government's wide-ranging bribery and corruption investigation into the pharmaceutical industry takes a new turn every week. Media reports contain numerous incidents of purported whistleblowers making allegations or bringing potential violations to the attention of the media or the government. According to the Chinese Government's Fourth Working Conference on Whistleblowers in 2008, more than 70 percent of prosecutions of government officials for corruption were based on whistleblower tips. This statistic alone is a useful reminder for companies to focus on policies and procedures relating to the handling of complaints from employees.

Chinese law regarding whistleblowers focuses on reporting the corrupt practices of government officials who receive bribes. Depending on the focus of the allegations, different branches of the Chinese Government may become involved. The Ministry of Supervision investigates government officials and the Disciplinary Commission of the Chinese Communist Party (the CCP) investigates CCP members. Central judicial entities such as the Supreme People's Procuratorate (the SPP), the Supreme People's Court and their regional outposts provide whistleblower telephone hotlines and websites. Additionally, the provincial Administrations of Industry and Commerce (the AIC) are the governmental agencies primarily responsible for regulating businesses, as well as collecting and compiling reports of public and private corruption.

Unlike in the United States, the financial incentives for whistleblowers are limited in China, especially from local government authorities. For example, the AIC of Shandong Province awards small sums of RMB 300 to 1,000 (approximately USD 50 to 166) for each tip, while the AIC of Yangjiang City in Guangdong Province caps rewards at RMB 30,000 (approximately USD 5,000). At the national level, the SPP announced in 2009 that whistleblower information leading to a conviction would result in both "spiritual and material rewards," including up to 10 percent of the illegal gains. However, the maximum reward amount that can be received is capped at RMB 200,000 (approximately USD 33,333) for "significant" cases.

In contrast, the False Claims Act, the Dodd-Frank Act and other U.S. laws contain whistleblower provisions that provide strong incentives to employees for reporting wrongdoing to the U.S. Government. For example, in return for providing the U.S. Securities and Exchange Commission (the SEC) with "original information," a whistleblower can receive between 10 to 30 percent of any monetary sanctions exceeding USD 1 million that the SEC or other law enforcement agencies

ultimately recover.

Chinese laws provide for whistleblower protection, and retaliation is strictly prohibited. However, in practice, these laws are weakly and unevenly enforced. The SPP reported in 2010 that more than 70 percent of whistleblowers were retaliated against, and that the majority of these retaliations were not acted on by government or judicial authorities. In contrast, U.S. law provides strong anti-retaliation protections for whistleblowers and is strictly enforced.

Although Chinese law does not offer the financial incentives provided for in the United States, whistleblowing in China is still a frequent phenomenon, as seen by the latest news reports and cases regarding pharmaceutical industry bribery investigations. Individual motivation for whistleblowing varies from legitimate concern about ongoing activities to a defensive ploy to diverting attention from other ongoing employment issues. Regardless of the motivation, however, the allegations of whistleblowers escalate the compliance risks of companies and must be addressed seriously. Companies that ignore the claims of whistleblowers do so at their own peril.

In light of the regulatory risks resulting from whistleblower laws in both China and the United States, companies should focus on strengthening their internal compliance and reporting systems to ensure employees' concerns are surfaced and dealt with systematically rather than handled in a haphazard manner.

To combat these risks, companies need to re-evaluate their compliance programs. A strong code of ethics endorsed by senior management is a critical starting point. Senior management should set the proper tone at the top, and throughout the organization, by establishing clear rules and engaging in fair and consistent enforcement of the rules. Strong anti-retaliation policies and solid training programs are also essential elements of a good compliance program. Companies must ensure there is adequate funding and staffing to do this important work.

The establishment of a good hotline or helpline with well-known procedures to protect the anonymity of whistleblowers is equally important. All complaints should be appropriately logged and promptly reviewed and investigated. Ongoing communication to complainants during the course of an investigation is key. Companies are well-advised to ensure there is no retaliation for reporting good faith compliance concerns.

A proactive approach that protects, incentivizes and rewards employees for compliant behavior and the internal reporting of potential issues will help limit the risk that employees will first report issues to government authorities as a whistleblower.

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