

India in Focus II: Whistleblowers

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Agenda

- 1. Importance of U.S. Whistleblower Laws**
- 2. Legal Framework of U.S. Whistleblower Laws**
- 3. Whistleblower Protections in India**
- 4. Trends and Best Practices**

Follow-up from Part One

- US Perspective
 - Increased cooperation between jurisdictions
 - 2017 Mondelez International settlement
 - India's Central Bureau of Investigation assisted with investigation
 - Substantive and procedural incentive
 - Expect additional standalone prosecutions by DOJ and SEC
 - Petrobras Investigation
 - Independent DOJ charges and settlement
- Indian Perspective
 - Not a large amount of cooperation
 - Result of lack of agreements

Part One

- 1. Importance of U.S. Whistleblower Laws**
2. Legal Framework of U.S. Whistleblower Laws
3. Whistleblower Protections in India
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Importance of Whistleblower Protections

- **Overview**

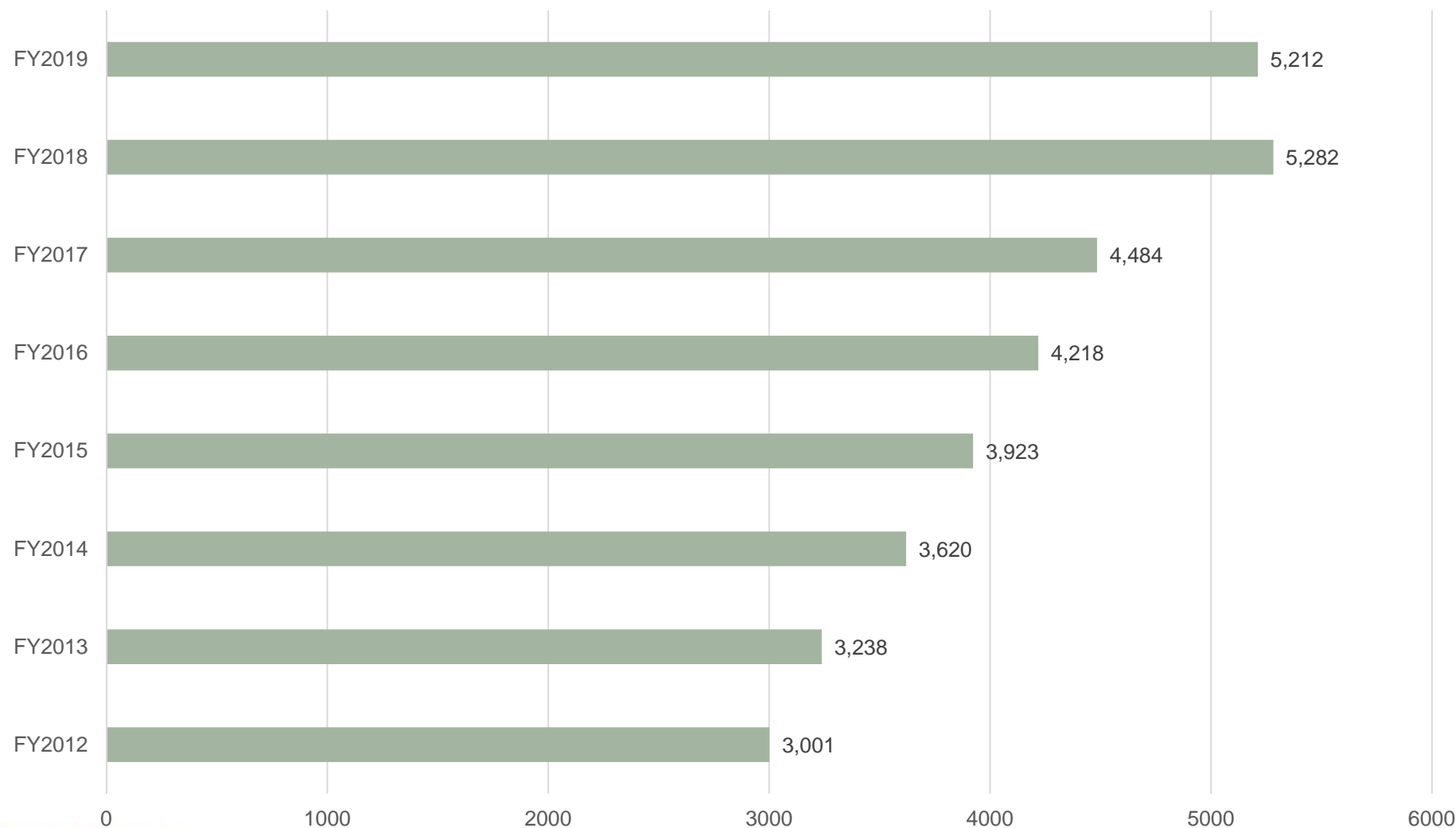
- Foreign nationals are eligible for Securities and Exchange Commission (“SEC”) bounties
- SEC established the Whistleblower Program in 2010
- Resulted in over \$2 billion in monetary sanctions against wrongdoers, including \$1 billion disgorgement of ill-gotten gains
- Approximately \$500 million returned to harmed investors
- Exponential Growth
 - 2018- \$168 million awarded to whistleblowers; CFTC awarded first bounty to foreign whistleblower

Importance of Whistleblower Protections

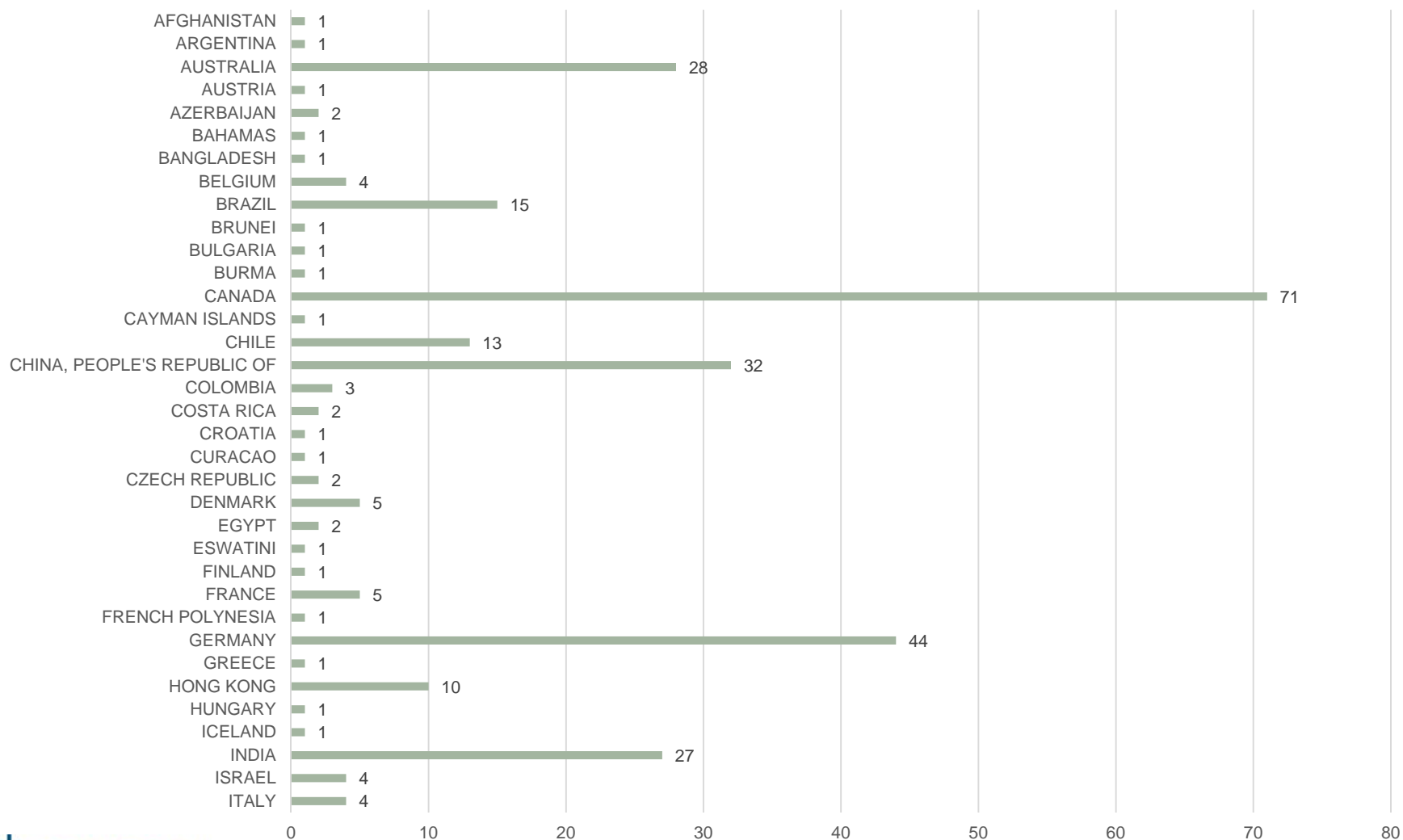
- **Recent Highlights**

- 2019:
 - Second largest number of whistleblower tips in a year
 - Third largest whistleblower award to date (\$37 million)
- 2018:
 - \$50 million award to joint whistleblower claimants (March 2018)
 - \$39 million award to whistleblower (September 2018)
- Awarded \$387 million to whistleblowers
- Over \$2 billion in monetary sanctions

Number of Whistleblower Tips



Whistleblower Tips Received by Geographic Location (Fiscal Year 2019)



Part Two

1. Importance of U.S. Whistleblower Laws
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Legal Framework for Whistleblowing

- **Relevant Legislations**

- Recent legislation to assist, encourage, and protect whistleblowers
- Sarbanes-Oxley Act (“SOX”)
 - More limited application to foreign employees
- Dodd-Frank Act (“Dodd-Frank”)
 - Only option for whistleblower bounty
- Both SOX and Dodd-Frank protect employees from retaliation for whistleblower disclosure

Relevant Terms

- **What is a Whistleblower?**

- An individual who reports a violation of a law, regulation, company standard or policy, or other ethical obligation
- SOX and Dodd-Frank protect employees from retaliation for whistleblower disclosure
- *Who are employees?*
 - Present workers, former workers, applicants, supervisors, managers, officers, and independent contractors (in some circumstances).
 - No distinction between foreign and U.S. personnel

Dodd-Frank

- **What Companies are Subject to Dodd-Frank?**
 - No restriction on *type* of company covered
 - May apply to any company
 - Limitations on type of legal violation covered

Applicable Legal Violations

- **What Type of Legal Violations are Covered?**
 - Alleged violation must relate to violation of securities law
 - Includes Commodities laws
 - Securities laws apply to both publicly and privately traded companies
 - *Example:*
 - 2017 – Zenefits
 - 2018 – Theranos

Reporting Violations

- **How Does an Employee Report the Violation?**
 - Dodd-Frank
 - Must report externally to SEC or CFTC
 - *Digital Realty Trust Inc. v. Somers*
 - Dodd-Frank whistleblowers protections do not cover internal whistleblowers
 - Proposals to amend to protect internal whistleblowers

Rewards for Whistleblowing

- Dodd-Frank
 - Whistleblower may be eligible for awards of 10% - 30% of monetary penalties recovered
- General Eligibility Requirements
 - Whistleblower must provide original information to SEC or CFTC voluntarily
 - Information must lead to successful enforcement action
 - SEC or CFTC must recover at least \$1 million in monetary penalties
- Implications for Compliance Employees
 - Generally not eligible for Dodd-Frank rewards unless:
 - Reported internally and at least 120 have elapsed since date of proper disclosure
 - Entity is engaging in “conduct that will impede an investigation of the misconduct”
 - Disclosure necessary to prevent imminent “substantial injury” to investors

Sarbanes Oxley- Key Differences to Dodd-Frank

- **What are the Key Differences between SOX and Dodd-Frank?**

1. No bounty program
 - Anti-retaliation provisions, but no rewards or bounties for reporting violations
2. More limited in terms of what companies are covered
 - Only applies to companies that are:
 - 1) publicly traded (including their private subsidiaries and affiliates); and
 - 2) private companies who provide services to publicly traded companies
3. Broader legal violation coverage
 - SOX violations can include: mail fraud; wire fraud; bank fraud; securities fraud; any SEC rule or regulation; or, any provision of federal law relating to fraud against the company's shareholders
4. Broader reporting coverage
 - Employee eligible for whistleblower protection if they report internally *or* to federal enforcement agency

Part Three

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Indian Whistleblower Laws

Companies Act, 2013 - An Unbaked Cookie

- The Companies Act, 2013 poses an obligation on certain companies to establish a 'vigil mechanism' which implies the establishment of a mechanism to report genuine whistle blower concerns. It also provides certain safeguards against the victimization of any whistle blower.

Issues with the said approach:

- Obligation to establish a whistle blower mechanism is not required to be followed by all the companies. Especially, in case of private companies, only those companies which (i) accept deposits from the public; and (ii) which have borrowed money from banks and public financial institutions in excess of INR 500 million, are under an obligation to establish a whistle blower mechanism.
- No prescription of how such a mechanism should operate and how investigations into complaints are required to be done. Therefore, it is also not clear as to what would be the process / procedure for conducting an internal investigation into whistleblower complaints. As a result, such a mechanism may vary from company to company.

Companies (Auditor's Report) Order, 2020 (CARO)

- There have been several instances where Indian companies have brushed aside whistleblower complaints and refrained from disclosing them to the shareholders by terming them as 'benami complaints'.
- In order to contain these situations, the Ministry of Corporate Affairs, Government of India, very recently, has issued CARO which applies to every company, including a foreign company as defined in the Companies Act, 2013.
- CARO puts an obligation on eligible companies (for exclusion, a small negative list is provided) to share information with their auditors, especially on whistleblower complaints received during the course of the year, for the consideration of the auditor, who usually then seeks to know the manner in which the company has dealt with such complaints which would include the nature of complaint and quantum involved.
- Such whistle blower complaints will be captured in the respective annual reports of the companies which could be accessed by public at large.

Proactive Role of SEBI

- The capital market regulator of India, SEBI has recently been very active in protecting and rewarding whistle blower concerns. A few examples are;
 - To promote the reporting of leakage of unpublished price sensitive information in relation to listed companies, SEBI mandated every listed company to set up a whistle blower mechanism.
 - SEBI introduced a reward mechanism for incentivizing informants to report violation of insider trading laws to SEBI. This reward can go up to INR 10 million. Sadly, reporting of any other kind of misconduct such as fraud, bribery and corruption, is not rewarded.
 - As per SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the listed companies in India are under an obligation to make a disclosure of material events to the stock exchange(s). However, it is not clear as to when, or at which stage of investigation, a disclosure pertaining to whistleblower complaint needs to be made before the stock exchange. There is a variance in the market practice wherein some companies report the receipt of a whistle blower complaint whereas a few prefer to report the investigation findings.

Whistle Blowers Protection Act, 2014

- Very limited applicability.
- Complaints can only be filed against any public servant for the acts of:
 - corruption; and
 - willful misuse of power.
- Misconducts within Indian companies cannot be reported under the said act.
- Nonetheless, important for Indian companies as the act may enable the Central Bureau of Investigation to initiate proceedings against Indian companies under the provision of corporate criminal liability for bribe giving.

Part Four

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Trends in India

Nature of whistle blower complaints

- In India, most common complaints are about corruption allegations, financial impropriety and improper conduct at workplace. Occasionally, sexual harassment issues are raised through the whistle-blower mechanism.

Concerns over anonymity

- A majority of the whistle blower complaints are anonymous in nature. As per the records, majority of them are found frivolous in nature and are filed because of a motive. Even if companies try to reach out to these whistle blowers for further information on their email ids and phone number, they often find them to be a fake one. This is a huge cost burden.

Prominent Whistle blower Complaints in Recent Times

- Infosys
- ICICI Bank

A Few Tips for Indian Companies

- As the legal privilege in India cannot be exercised over the communications with / work product of an in house counsel, it is advisable for the companies to appoint an external counsel for the investigation of issues arising out of the whistle blower complaint. As in most of the whistle blower complaints, the allegations are against the top management, therefore, the external counsel could conduct the investigation without any bias.
- Even if a company is not covered under the selective list of companies which are required to establish a vigil mechanism, it should still set up a whistleblower mechanism on voluntary basis. It can enable companies to anticipate issues before those issues are reported to agencies. Though most agencies in India do not give credit for self-reporting, it is always better to know and remediate the issues before such issues reach to agencies.

A Few Tips for Indian Companies...

The whistle blower policy should take into account the following:

- **Seamless procedure for reporting wrongdoings**: Do the employees know how to lodge complaints and to whom? Is there a process to facilitate external reporting as well i.e. to regulators et al?
- **Reportable conduct**: Does your company policy clearly identify and define conduct or activities to be reported?
- **Anonymity and confidentiality**: Does the policy facilitate anonymous reporting? How does the organization ensure the anonymity of the whistleblower and confidentiality of the information?

A Few Tips for Indian Companies...

- **Retaliation and retribution:** Does the policy articulate the mechanism to protect whistleblowers against potential retaliation?
- **Investigation and outcome:** Timeline for investigating complaints and communicating outcomes.
- **Consequences for frivolous reports:** Does the policy spell out consequences for making false and bad faith disclosures?

Responding to Whistleblower Complaints

- **Best Practices**

- Review HR policies and ensure protected communication line for internal reporting
- Allegations of legal violations should be evaluated by qualified and experienced personnel, and investigated thoroughly.
- Reports should be investigated within 120 days
- No retaliation of any form
 - Identify of Whistleblower should remain confidential
 - Companies may be punished for retaliation
 - *Example:* KBR, Inc.
- Avoid disclosing whistleblower complaint to managers or supervisors

Questions

Please use the Q&A function in the Zoom taskbar to submit your question to the Panelists

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