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WHISTLE BLOWING - IS IT SEDITION OR PUBLIC DUTY IN EMERGING ECONOMIES

Abstract:

This article reviews if the introduction of new laws to encourage and protect whistle blowers is sufficient to improve corporate governance in Malaysian public listed companies. It provides suggestions to formulate internal whistle blowing policies for companies. It concludes that due to the culture of the people and the taxonomy of Malaysian public listed companies and companies in other countries in the Asia-Pacific region, having laws to encourage and protect whistle blowers to get rid of corporate wrong-doings is not necessarily the only solution.

The article defines whistle blowing and the benefits of encouraging whistle blowers. It proceeds to highlight the issues of concern on whistle blowing. It also deliberates particular issues of whistle blowing in Malaysia by discussing the taxonomy of Malaysian public listed companies, the strength of the regulators in enforcement, the Malaysian culture and the Malaysian corporate scandals. The article elaborates on the whistle blowing laws in Malaysia and concludes by providing alternate ways to encourage whistle blowing in Malaysian companies having in mind the taxonomy of Malaysian companies and enforcement by regulators.

Keywords:

Whistle-blowing, emerging economies, laws and regulations

JEL Classification: K00

1. Introduction

The East Asian economic and financial crisis of 1997/1998 and 12 years later, the global financial crisis, have both generated a significant amount of analysis and debate, particularly about macroeconomic issues such as exchange rate volatility and good corporate governance, in the region and globally respectively. In addition, the financial crises have also provoked increased awareness about issues concerning the role and function of regulators and the need for improved disclosure and good corporate governance. The crises brought to light various other specific issues and these include:

- accounting practices;
- whistle blowing;
- political connections and donations to political parties;
- anti-bribery enforcement; and,
- corporate compliance programmes.

This article deliberates on the second issue that has been highlighted, the importance of whistle blowing. In the famous Enron case,[1] the failure of Enron's auditors to 'blow the whistle' on Enron's executives underlines the need, not only for reform of the accountancy profession but, for there to be alternative mechanisms in place through which employees – and auditors – can communicate concerns over malpractice, bribery or corruption *without fear of reprisal.*

The Enron whistle blower, Sherron Watkins, in her evidence submitted at the investigation, highlighted that she did not approach her two managers with her concerns on the grounds that this would be "fruitless" and might cost her job.

According to Drew[2], the case provides a number of lessons in what is undoubtedly a difficult but crucial area:

- *The importance of including measures to support whistle blowing*: whistle blowers provide a potentially powerful vehicle for increasing the detection of bribery and corruption and thereby serve to deter bribery and corruption. She said the OECD Convention does not impose obligations on governments regarding whistle blowing, although its Revised Recommendations provide that countries *should require auditors who discover bribes to report to management and as appropriate to corporate monitoring bodies*. She went on to add that the scope of the Convention should be extended to cover whistle blowing more generally and require governments to put in place measures for protecting and encouraging whistle blowers.

- *The limitations of in-house whistle blowing systems*; Enron management had created '*almost a culture of corporate corruption'*[3]. Drew says that in such a case it is hard to imagine how internal systems of whistle blowing based on reporting to management could succeed. This underlines the need to pay greater attention to the prescription of whistle blowing mechanisms that are *independent of company management,* as well as disclosure routes that are *external to the company;*

- *The need for better research;* there is a woeful lack of case study material on whistle blowing. Better research would help assess the effectiveness of different mechanisms. Given that the enactment of national anti-bribery legislation in all

> OECD countries will stimulate the private sector to draw up corporate compliance programmes, then this would seem to present an ideal opportunity to ensure that best practice is developed and integrated into these programmes.

Malaysia, like many other countries in the Asia-Pacific region has made amendments to their various laws including the introduction of the Whistle Blowing Act 2010 to encourage and protect whistle blowers. This article reviews if the introduction of new laws to encourage and protect whistle blowers is sufficient. It also looks into the formulation of internal whistle blowing policies for organizations as an alternative method to encourage whistle blowing. It concludes that due to the culture of the people and the type of companies in Malaysia and many other countries in the Asia-Pacific region, having laws to encourage and protect whistle blowers to get rid of corporate wrong-doings is not necessarily the only solution.

The first part of the article defines whistle blowing and the benefits of encouraging whistle blowers. Part II proceeds to highlight the issues of concern on whistle blowing. Part III deliberates particular issues of whistle blowing in Malaysia by discussing the taxonomy of Malaysian PLCs, the strength of the regulators in enforcement and the Malaysian corporate scandals.
The penultimate part IV elaborates on the whistle blowing laws in Malaysia and the final part V concludes by providing the way forward for Malaysia.

2. Whistle blowing

Whistle blowing is all-pervasive and is pertinent to all organizations, big or small it also envelopes all the employees not only the ones who indulge into fraudulent or illegal activities.[4] It generally refers to disclosure of an illegal or corrupt act.

According to Ralph Nader, US Consumer Activist, whistle blowing is,

> *An act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal,fraudulent or harmful activity.*[5]

Another definition of whistle blowing put forth by the International Labor Organization is, *"The reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers."*[6]

Rachagan and Pascoe[7] (2005) stated that :

> *Whistle blowing is a term used to describe the disclosure of information by someone who reasonably believes such information is evidence of contravention of any laws or indicates any mismanangement, corruption or abuse of authority.*

Whistle blowing could also be termed as the act of disclosing information in the public interest. [8]

Here are some other definitions on whistle-blowers. Tom Devine, the legal director of Government Accountability Project in U.S.A. defined a whistle blower as "*an employee who exercises free speech rights to challenge institutional abuses of power that betray the public trust*".[9] The University of California, in its whistle blowing policy, stipulates

that a whistle blower is "*someone who discloses or tries to disclose information that may show a violation of law, economic value, or gross misconduct, gross incompetence or gross inefficiency.*"[10] In a corporate context, Figg[11] defined whistle blowing as a "*disclosure of information by an employee or contractor who alleges willful misconduct carried out by an individual or group of individuals within an organization*". Miceli, Near and Dworkin defined[12] whistle blowing as disclosure of "*illegal, immoral, or illegitimate practices to persons or organizations that may be able to effect action*."

After knowing the extent of whistle blowing contribution to wrest fraudulent activities in an organization, it would be pathetic if it is not utilized to improve corporate governance.

One method to increase the effectiveness of whistle blowing is by enhancing the internal control systems. Internal auditors, who are responsible for overseeing proper compliance of internal control systems, should take earnest efforts to encourage and streamline whistle blowing information through the right channel in the organization. Preferably, internal auditors should be required to devise clear and objective whistle blowing policies that can assure employees, and at the same time, encourage them to come forward with disclosures of malpractices of other employees. Furthermore, an internal channel for whistle blowing information can save the company from the acrimony of the investing public, and the possibility of leaving an "indelible stain" in the records of the company. In fact, according to the IIA's Position Paper[13] on whistle blowing, "*for organizations with internal audit functions that adhere to the standards and ethics of the IIA and that are headed by an audit director with full access to an audit committee, there should be no need to report in an unauthorized manner to anyone outside the organization.*" Nevertheless, there can be exceptions. In situations where the internal auditors are in dilemma, they might be compelled to resort to external avenues like that provided by the Whistle Blowing Act 2010, the Capital Markets and Services Act 2007 and the Companies (Amendment) Act 2007, which have accorded the necessary protection. This is discussed in part 4 of this paper.

2.1 Issues in whistle blowing

In most places of employment, employees are the ones who will be the first to stumble through the misconduct of other employees. But, they may be reluctant to expose these employees due to fear of retaliation or loss of friendships of colleagues. Employees in this predicament have the following options:

- To remain silent
- To raise the concern through an internal procedure
- To raise the concern with an external body, such as a regulator, or
- To make disclosure to the media.

In all the above options except the first, the employee who discloses misconduct will be subjected to unwarranted judgment and ridicule. Unless the culture in the organization is one that allows employees to speak up without fear, each of the above options can have negative repercussions. Thus, it is necessary to establish proper procedures for employees to voice out their knowledge of malpractices within the organization. In this way, a deterrent atmosphere can be created for unscrupulous employees who may start to assume that "anything goes" feelings in the conduct of their duties.

From the above sections, it can be understood that whistle blowing is an act of disclosing wrongful conduct of individuals or group of individuals through the designated channels in the organization.

The issues within whistle blowing are as follows: who qualifies as whistle blowers, what constitutes a protected disclosure, and if there are proper channels, what these channels are. The Public Interest Disclosure Act 1999 (U.K.) used the concept of "worker" to determine as to who qualifies as a whistle blower. It covers all employees, trainees, agency staff, contractors, homeworkers and also includes everyone involved in the National Health Safety. These are the individuals who will be protected when they "blew the whistle". It does not cover the genuinely self-employed, volunteers, the intelligence service, the army or the police. This act does not confer protection to all disclosure. The "protected disclosure" should raise concerns about past, present and future malpractices in relation to:

- A criminal act
- A failure to comply with legal duty
- A miscarriage of justice
- Danger to health and safety
- Damage to the environment
- Deliberate cover up of any of these.

On the issues of proper channel, the Sarbanes-Oxley Act specified that protection be granted when it is communicated through an allowable channel. It enumerated these allowable channels as follows:

- Made direct to the employer or through proper procedures authorized by the employer
- Made in the course of obtaining legal advice
- Made to a government minister who has appointed the worker's employer, or
- Made to a person prescribed by a secretary of state.

Thus, it must be reminded that not all disclosure warrants protection. All prerequisites must be complied before one can initiate any legal protection. This constraint, in a way, restricts unnecessary or malicious complaints, and on the other hand, provides incentives to individuals withholding "qualified disclosure" to relieve themselves of their ethical dilemma.

3. Whistle blowing in Malaysia

In view of governance enhancing initiatives, there have been some interesting development in Malaysia. In 2002, the Malaysian Institute of Accountants (MIA) set up the Practice Review Committee to monitor the quality of work performed by external auditors. In June 2009 it set up the Ethics Standards Board to serve the public interest by issuing professional and ethical standards with the objective of taking full advantage of the integrity of the accounting profession.

Also, the Institute of Internal Auditor Malaysia (IIAM) has put in place the quality assurance procedures to ensure that the quality of work performed by internal auditors is closely monitored. In 2010, the Audit Oversight Board was formed by the Securities Commission whose purpose is to oversee the auditors of public interest entities. It is also to protect the interests of investors by promoting confidence in the quality and

reliability of audited financial statements. Further, the Malaysian Institute of Integrity (MII) was formed to implement the National Integrity Plan.

Despite all these efforts, Malaysia seems not to be able to curb incidences of fraud and encourage whistle blowing. The 7th Global Crime Survey was carried out by PricewaterhouseCoopers in 2014[14] and it was seen that there was an increase in economic crime during the recent economic downturn. The reasons for the crimes were incentives or pressured (68%), opportunity (18%) and attitude/rationalisation (14%). The three most common types of economic crimes experienced during the economic downturn were asset misappropriation, accounting fraud and bribery and corruption. While anti-fraud controls like risk management seems to be improving fraud detection, globally only 5% of frauds seems to be detected by whistle blowing. This may suggests either the ineffectiveness or the absence of such procedures, which could be due to lack of support within organisations, insufficient publicity and/or leadership not been seen to take whistle blowing seriously.

According to the Corruption Perceptions Index (CPI) 2014 by Transparency International, Malaysia is ranked 50th out of 175 nations surveyed with a 52 score out of 100, an improvement from 50 out of 100 from the previous year.[15] To understand the causes of this decline, one has to look at the early warning signs of increasing fraud cases prior to 2009 that were linked to poor or biased external and internal auditing systems. Indeed, a report issued by PricewaterhouseCoopers in 2007 found that more than 50% of fraud detection is directly linked through internal sources-internal audit as well as employees of an organisation, of which, 10% occurs as a result of whistle blowing.[16]

Malaysia has revamped its laws to offer greater protection and encouragement to whistle blowers. However, the nature and structure of Malaysian PLCs, the strength of the regulators and the Malaysian culture all do not seem to encourage whistle blowing.

3.1 Malaysian Public Listed Companies

In order to understand if whistle blowing will work in Malaysia, it is useful to look at the nature and structure of Malaysian PLCs. According to Thillainathan,[17] the shareholdings in PLCs in Malaysia are broadly concentrated. In his paper, an analysis of a sample of companies comprising over 50% of Bursa Malaysia's market capitalization showed that the five largest shareholders in these companies owned 60.4% of the outstanding shares and more than half of the voting shares. Some 67.2% of shares were in family hands, 37.4% had only one dominant shareholder and 13.4% were state-controlled.

Classens *et al*[18] in their research found that in Malaysia, the top 10 families control about 25% of the total market capitalization. Zulkafli *et al*[19] (Figure 1) found that total shareholding of the five largest shareholders in Bursa Malaysia at December 1998 was 58.84%, a figure which has decreased slightly in recent times. The study conducted in 2006 and reported in 2007 by On Kit Tam *et al*[20] (Figure 1), found the average concentration of the five largest shareholders in the top 150 Malaysian listed companies is 54.85%.

Therefore with the high concentration of family owned companies and state controlled companies which are owned and managed by high standing families in the Malaysian society and politically well-connected persons, it is very unlikely that Malaysians will blow the whistle against any fraudulent activities in these companies.

3.2 Regulatory Authorities

Regulatory authorities have shown some commitment to whistle blowing. For example, Bursa Malaysia's Corporate Governance Guide 2009 recommends that companies have a whistle blowing policy and states that it is the duty of every employee to express concerns relating to matters such as criminal activity, negligence, contractual breaches, as well as workplace health and safety issues, whether or not the information is deemed confidential. The guide urges companies to ensure that employees can raise concerns about misdemeanours in confidence and sets out some suggestions for whistle blowing report procedures, including a sample whistle blowing policy.

However, the general enforcement by the regulatory authorities in Malaysia has generally been considered relatively low.[21] The Securities Commission has investigated a significant number of cases ranging from submission of false and misleading information, the use of schemes to defraud as well as the engagement in acts to defraud and short-selling.[22] However, the prosecution and subsequent conviction of company officers for breach of law in public listed companies has been relatively small.[23]

Public governance is another important point to be noted. It includes governance over institutions such as the Securities Commission, the Companies Commission and Bursa Malaysia. The public listed companies in Malaysia are highly concentrated and ownership involves people with strong political connections. It therefore places the Regulators, who are government appointees and answerable to the Minister of Finance, in a very difficult position if they have to sanction these companies for having breached the law, regulation or best practices.

The independence and transparency of these bodies have been questioned in the past where there was blatant breach of the law and the regulatory bodies were slow to prosecute.[24]

To add to the problem (and maybe it is another cause and effect of poor enforcement) is the existence of corruption. The Transparency International 2009 report[25] and the World Business Environment Survey[26] do show fairly astonishing figures in comparison to Hong Kong and Singapore. In Malaysia, 20% of public officials take bribes frequently whereas an additional 25% take it sometimes compared to Hong Kong and Singapore where there is almost no corruption or very little corruption.[27]

3.4 Corporate Scandals

In this part, two Malaysian PLCs namely Transmile Group Berhad and Megan Media Holding Berhad, which are embroiled in corporate scandals are discussed.

In the Transmile case, a special audit carried out by Moores Rowland Risk Management Sdn. Bhd, revealed amongst other discrepancies, the company recorded

pre-tax losses of MYR77 million and MYR126 million for 2005 and 2006, respectively, instead of pre-tax profits of MYR207 million and MYR120 million as originally reported, suggesting a total of MYR530 million in overstatement. It was discovered that CEN Worldwide Sdn Bhd a major customer and associate of Transmile owed RM103 million and there were incidences of under billing or non-billing of CEN's debts to Transmile. One of the directors of CEN Worldwide was a nephew of the founder and former director of Transmile.[28] The news of overstatement of profits caused the share price of Transmile drop from MYR8.90 to MYR6.00 in 2007, a 32 percent decrease.[29] This slump of share prices was a rude shock for the minority shareholders of the company.[30] The Minority Shareholder's Watchdog Group (MWSG) questioned the effectiveness of Transmile's audit committee in allowing such losses and alleged fraud and the failure of independent directors and internal auditors in detecting the fraud.[31]

Another corporate scandal involves Megan Media Holding Berhad (MMBH). This company and its subsidiaries defaulted on MYR893.97 million in maturing banking facilities. The optical disk maker was found to be involved in fictitious trading.[32] It was reported that MMBH's problems were not confined to the mounting debts, but also the fictitious transactions that might have involved more than MYR500 million cash.[33] The company was expecting huge payments from the fictitious creditors which in reality did not exist.

The creditor banks hired Ferrier Hodgson MH Sdn Bhd to conduct investigations on MMBH's subsidiary, Memory Tech Sdn Bhd (MTSB). The interim findings of Ferrier Hodgson showed that MTSB's suspect transactions included MYR211million deposit paid for 13 production lines that could be fictitious, in addition to the fictitious trading that resulted in receivables totalling MYR334.3 million. It also revealed that MTSB's assets could potentially fall short by MYR456 million. Ferrier Hodgson said the value of MTSB's fixed assets of MYR585 million needed to be investigated further while the net realisable value was unknown. The investigation discovered that the payments to all trading creditors were actually made to other parties in a move to channel cash out of MTSB. MMBH's balance sheet as at 31 Jan 2006 showed that borrowings stood at MYR888million. Its receivables grew to MYR430.3million from MYR319 million a year earlier. The cash flow statement showed a negative net cash of MYR57.9 million generated from operating activities.[34] MMBH shares plunged to a record low of 14.5 cents in 2007.[35] The Securities Commission has taken criminal action against two former officials of MMBH for misappropriation of company's funds but once again the minority shareholders suffered losses due to misappropriation by insiders.[36]

In neither of these cases was there any whistle blowing by the shareholders and/or employees. Therefore, there should be alternative ways for shareholders and/or employees to ensure that the companies practice good corporate governance.

4. Regulatory review of whistle blowers protection in Malaysia

In light of the East Asian economic and financial crisis of 1997/1998 and 12 years later, the global financial crisis, Malaysia has enhanced its whistle blowing provisions. Lehmann[37] states that the belief that anonymous whistle blowing mechanisms won't work in Malaysia or anywhere else for that matter, is simply not true and is really not a good enough reason for choosing not to have one.

Malaysia has made major changes in its laws to encourage whistle blowing. In 2009, the government introduced the Malaysian Anti-Corruption Commission (MACC) Act 2009, replacing the old Anti-Corruption Act (ACA), as the one and only mechanism set up to deal with corruption. The concern in Malaysia is whether the enactment of these new laws is more on paper rather than on the enforcement. However, with the enactment of MACC Act 2009, there have been increasing numbers of corruptive practices under investigation. The full impact of the Act is evidenced by MACC arrest statistics as shown in Table 4. This has been encouraging and a positive step towards arresting the degradation of public governance.[38]

In the past, even after 25 years of the existence of ACA, the effectiveness of its operations was always lamentable. Legislation was passed on 31st July 1997. It came into effect in January 1998, giving the ACA more legislative power to combat the problems of corruption as well as exterminating the problem of relying on different Acts in carrying out its duties. Something akin to whistle blower protection has been incorporated in the Act but to what extend it is effective is yet to be seen. The MACC Act has adopted a similar provision. Recently, the approach towards whistle blowers protection has been more direct. The Whistle blower's Protection Act has been passed in 2010. Thus, there is explicit benchmark or guidance for organizations to institute whistle blowing policies, though there may be a lot of shortcomings.

The following is a review of some current legislation besides the ACA that is in place in Malaysia regarding whistle blowers' legislation as well as whistle blowers' protection.

The Malaysian Anti-Corruption Commission Act 2009

This Act accords reasonable amount of protection for whistle blowers. Section 65 of the Act provides for the protection of informers helping the authorities in combating corruption. Section 72 of the Act provides immunity from any legal action provided the statements made or action taken was done in good faith. Similarly the act provides for the protection of employees reporting corruption. The act also protects any person who discloses information or produces documents from any proceeding or civil liability.

Capital Markets and Services Act 2007

In January 2004, amendments were made to the Securities Industry Act 1983. The inclusion of sections 99E and 99F introduced the whistle blowing provisions into securities law. The two key components of the whistle blowing provisions include mandatory duty for auditors to report to the relevant authorities' breaches of securities laws and listing requirements. This requirement supplements existing requirements in the Companies Act imposing a similar duty on auditors to report to the relevant authorities' breaches of company law and protection against retaliation for specific categories of persons, namely chief executive officers, company secretaries, internal auditors and chief financial officers who report to the authorities on company wrong doings. The protection against retaliation includes protection against discharge, discrimination, demotion and suspension by the company on the whistle blower. These provisions have now repealed and inserted in the Capital and Market Services Act 2007 (CMSA).

The two relevant provisions in the CMSA are sections 320 and 321. Section 320 provides a mandatory duty on auditors of a listed corporation to report, what is in his professional opinion, a breach of the securities laws, Bursa Malaysia Listing rules or

any other matter which adversely affects to a material extent the financial position of the listed corporation to the Securities Commission and Bursa Malaysia.

Section 320(2) provides that no auditor shall be liable to be sued in any court for any report submitted by the auditor in good faith and in the intended performance of any duty imposed on the auditor under this section. Also, the Securities Commission may, at any time during or after an audit, require an auditor of a listed corporation to submit such additional information in relation to his audit.

Section 321 of the CMSA provides a protection for the chief executive officer or officer responsible for preparing or approving financial statements or financial information who has in the course of the performance of their duties any reasonable belief of matter which may or will constitute a breach of the securities laws or rules any matter which may adversely affect the financial position of a PLC. The section states that the chief executive officer or officer shall not be removed, discriminated, demoted, suspended or interfered with the lawful employment or livelihood of the listed corporation because of the report submitted by any of such persons.

Section 321(2) further provides that no chief executive officer responsible for preparing or approving financial statements or financial information, internal auditor or a secretary of a listed corporation shall be liable to be sued in any court for any report submitted by such person in good faith and in the intended performance of his duties.

Companies (Amendment) Act 2007

Section 174 (8A) provides that if an auditor in the course of performance of his duties as an auditor of a public company or a company controlled by a public company, is of the opinion that a serious offence involving fraud or dishonesty is being or has been committed against the company or this Act by officers of the company, he shall forthwith report the matter in writing to the Registrar.

Section 174A (2A) inserted a provision that no auditor shall be liable to be sued in any court or be subject to any criminal or disciplinary proceedings for any report under section 174 submitted by the auditor in good faith and in the intended performance of any duty imposed on the auditor under this Act.

Section 368B provides that where an officer of a company in the course of performance of his duties has reasonable belief of any matter which may or will constitute a breach or non-observance of any requirement or provision of this Act or its regulations, or has reason to believe that a serious offence involving fraud or dishonesty, as defined under paragraph 174(8C)*(b)* has been, is being or is likely to be committed against the company or this Act by other officers of the company, he may report the matter in writing to the Registrar.

Witness Protection Act 2008

Section 24 of the Act provides protection for witnesses who had agreed to give evidence in good faith on behalf of the government. The Director General shall be responsible for the
recommendation of witnesses to whom protection and assistance may be provided under the Act.

Whistleblower Protection Act 2010[39]
Malaysia has recently passed the Whistleblower Protection Act 2010 which provides protection to informants who give confidential information to government enforcement agencies.

A person could not seek protection under the Whistleblower Protection Act 2010 if he exposes the information to the media as it contravenes the sub-section in which the informant was to be given protection when he revealed information to an enforcement agency. Therefore the protection for the informant would be withdrawn if the informant exposed it to the media after disclosing the information to enforcement agencies. This it has been said is to protect the person that is suspected of misconduct as the information could be false and it could also jeopardise the investigation.[40]

5. The Way Forward

Lehmann[41] states that it is surprising how many organisations are interested in adopting and maintaining good corporate governance standards and they choose to operate their whistle blower reporting mechanisms internally. This is particularly true when the cost of operating whistle blower systems using an independent provider is insignificant. He goes on to say that when one recognises the value of whistle blower systems in detecting serious misconduct such as fraud and corruption, combined with the major reason that whistle blowers do not come forward, the decision to keep this function in-house is puzzling. These considerations coupled with the increased corporate governance standards, responsibility and liability of directors and senior management, makes it all the more important to provide employees with an additional avenue to voice concerns.

He also says that good corporate governance and a plethora of objective case study evidence make an overwhelming case for the implementation of an anonymous whistle blowing mechanism.

In light of the above, this article concludes that enhancing external whistle blowing provisions are an important way forward but due to the composition of Malaysian PLCs and the Malaysian culture, it is also important to encourage internal whistle blowing provisions. This will be a better option rather than hoping to totally eliminate the need for whistle blowing completely by companies having a safe way to discuss and manage ethical concerns or going to external bodies to blow the whistle.

5.1 Developing internal whistle blowing policies – an aid to internal auditors
In large organizations, a special position can be established for the sole purpose of developing whistle blowing policies and to cater for complaints. The internal auditor is however deemed to be most suited for this task as he is ideally equipped to investigate allegations inconspicuously within the organization. Internal auditors have the ability and resources to determine the most effective way to check whether the complaints are correct without causing undue damage or disruption to other employees in the organization. In small to medium-sized organizations, the whole process of whistle blowing, i.e. from receiving the complaints to the completion of investigation, may squarely fall onto the shoulders of the internal auditor. Hence, a cordial working relationship with staff, supported by a well-developed whistle blowing program will

assist internal auditors in stimulating an environment for the development of compliance and ethical-conscious employees within organizations. This ethical ambience can be a good indicator of the level of corporate governance prevalent in the organization.

Initially, the process of developing a good whistle blowing policy should commence with the task of identifying the objectives of the whole program. There can be many objectives aligned to the organization's type, culture and its expectation on the level of ethical awareness. Some of these objectives can be summarized as below:

- To foster a cooperative culture that encourages staff to report misconduct internally and allow the report to be thoroughly investigated.
- To have staff contribute towards the steadfast adherence of the organization's code of conduct.
- To help raise the level of awareness of the organization's code of conduct and initiate consistent reviews of the code.
- To cascade the ethically focused core values from the chairman all the way down the hierarchy of the organization.

Though the summarized objectives may reflect the general aim of a whistle blowing program, organizations may seek to achieve their own specific agendas with respect to this program. For instance, organizations may specifically emphasize on the curtailment of fraud or mismanagement in their objectives, or state explicitly to encourage employees to come forward to report any malpractices.

Subsequently, a good whistle blowing policy should have the definitions of the key terms commonly used in the policy, such as whistle blower, protected disclosure, wrongful act, or any other relevant terms. The terminology of key terms may vary between firms.

The main part of a whistle blowing policy should revolve around matters with regard to procedures for reporting, procedures for investigating, and roles, rights and responsibilities of all people involved in the process. In addition, it should also have a section on the protection that will be accorded to the whistle blowers. These issues are explained here in greater detail.

5.1.1 Procedures for reporting

These procedures must clearly identify the person who qualifies to make the report of allegation of improper conduct. They can be from within or outside the organization. Those within the organization will have an internal source to channel their complaints, whereas, external complainants can either report to internal officers-in-charge or resort to external avenues stipulated in the procedures. The person can always choose to remain anonymous. Advisably, reports should be made in writing. This does not mean that oral submissions are to be rejected. In all equality, it should also be given earnest consideration. Complainants should be encouraged to present their reports to their immediate supervisor, unless, in the interest of confidentiality, the matter may be directed to the internal officer-in-charge.

5.1.2.Procedures for investigation

This part of the policy will describe who will be mainly responsible for the investigation of such complaints. In most cases, as it has been repetitively mentioned, it will be the internal auditor. However, it does not mean that other employees need not be involved. In some organizations, it might be structured in such a way that each functional unit has their own investigation group. These members might participate in the process of investigation. An investigation workgroup can be formed and chaired by the chief internal auditor. In this kind of modus operandi, the role and responsibilities of the investigation workgroup should be objectively defined. Investigative activities should be carried out in accordance with the appropriate rules and laws that are applicable to the organization. All employees must be informed that they have a duty to cooperate with investigation initiated under this policy. Employees who are being investigated can be placed under administrative or investigative leave, if the organization discerns that it would be in the best interest of the employee. Detail documentation should be maintained at all phases of the investigation.

5.1.3 Role, rights and responsibilities

This section highlights what is expected from the whistle blowers, investigation participants, subjects and the investigators. Whistle blowers should be alerted about the validity of a disclosure, be advised to avoid investigating on their own accord, be candid when making the report, and be informed about their rights for protection. As for the investigation participants, they have a duty to fully cooperate during the investigation process, they should refrain from discussing or disclosing to anyone not related to the investigation. They can request for anonymity, and should be well informed about the protection for retaliation from superiors. As regards to investigation subjects, they have to be informed about the formal investigation at the very beginning. They should fully cooperate by providing any necessary input to the investigation. The subjects should also be granted the right to seek any legal representation. Since the subject will be the most affected individual, it is extremely important that his role, rights and responsibilities are clearly spelt out in order to avoid any litigation that may be detrimental to the organization. Lastly, investigators must perform their task with proper authorization, competency, independence and unbiasness. They should exhibit a duty of fairness, objectivity, thoroughness, ethical behaviour, and also observe legal and professional standards. Investigators can only initiate formal investigation after preliminary considerations.

5.1.4 Protection for whistle blowers

Employees should be made aware of the protection available for whistle blowing. They must be informed about the circumstances where they will be eligible for protection. The procedures for filing a retaliation complaint, how a complaint will be investigated, the basis for decision and corrective actions, and procedures for appeal are some of the information that should be presented under this part. These are vital issues that employees should have complete knowledge of, so that they will feel assured and comfortable to “blow the whistle”.

Apart from what had been discussed, the whistle blowing program should not neglect the task of preparing employees to understand and accept these policies, review and revise the company’s code of conduct to coordinate with ethical value expectations of top management, and identifying suitable methods to monitor compliance matters.

5.2 Other initiatives to encourage internal whistle –blowing

Companies should create a culture that encourages employees to ask questions early and pick out unethical or illegal practices. The way this could be done is:

- *Conduct training.* Training should include teaching all employees how to deal with situations when wrongdoing occurs within a company without having to worry about retaliation.

- *Provide financial incentives.* The reward system will provide incentive for valid whistle blowing. This will not only lessen employees' fears of retaliation, it would give them a financial inducement to step up.

- *Allow anonymous whistle blowing.* As it can be seen in part 3 of this article, due to the ownership structure of Malaysian PLCs and the Malaysian culture, whistle blowing will not always be an acceptable method to bring to the forefront company misdemeanours. However, if anonymous whistle blowing is permitted, it would encourage more employees to whistle-blow on fraudulent activities.

6. Conclusion

As Malaysia is striving towards achieving a higher standard of corporate governance, whistle blowing should be viewed as a tool that will complement all other initiatives to enhance corporate governance in Malaysia.

Considering the complementing contribution of whistle blowing to deter fraudulent activities in organizations, it is imperative to integrate proper whistle blowing policies to enhance the effectiveness of internal control systems. Internal auditors, who are responsible for overseeing steadfast compliance of internal control systems, should diligently encourage and streamline whistle blowing information through the right channel in the organization. Hence, it is incumbent on them to devise clear and objective whistle blowing policies that can assure employees, and at the same time, encourage them to come forward with disclosures of malpractices of other employees. By instituting these policies, not only it mitigates malpractices but also protects the reputation of organizations. Detrimental or disparaging information or problems are kept and solved in-house, avoiding the wrath of investing public. The IIA's Position Paper[42] on whistle blowing distinctly supports an internal approach. It stipulates that "*for organizations with internal audit functions that adhere to the standards and ethics of the IIA and that are headed by an audit director with full access to an audit committee, there should be no need to report in an unauthorized manner to anyone outside the organization.*" Richard Girgenti, Partner in the Forensic and Litigation Services Practice for KPMG, in support for internal channels for whistle blowing, iterated that "*an effective corporate compliance program is the best means of discouraging whistle-blowers from seeking outside remedies*." Therefore, the onus is upon internal auditors to reflect on the ethical code of conduct of the organizations and develop whistle blowing policies that can elevate the organization to a higher level of ethical consciousness, and propagate efficient and effective internal control systems.

Nevertheless, there can be exceptions. In situations where the internal auditors are in dilemma, they might be compelled to resort to external avenues. For such situations,

in Malaysia, the Capital Markets and Services Act 2007, the Companies (Amendment) Act 2007, Malaysian Anti-Corruption Commission Act 2009 and recently, the Whistleblowers Act 2010 have accorded the necessary protection.

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