



## CORPORATE WHISTLEBLOWING/VIGIL MECHANISM IN INDIA: A STRONG TOOL FOR DETECTION AND DETERRENCE OF INSIDER TRADING

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**Abstract:** *Insider trading is a securities fraud or a corporate crime of tremendous magnitude caused by manipulation of stock markets by insiders. Insiders may be anyone with a brokerage account could make money in the financial markets if they know what is going to happen tomorrow. Corporate insiders have exactly that advantage at times since they have access to non-public price-sensitive information. Consequently, securities laws prohibit insiders from trading on such information in order to maintain a level playing field. Corporate insiders who do engage in trading on non-public inside information are guilty of illegal insider trading. Officers, directors, and employees of public corporations who buy and sell stock they own in their companies are required to report those transactions to the Securities and Exchange Board of India(SEBI). Illegal insider trading is not limited to corporate insiders. If friends, family, and business associates of corporate insiders are tipped and trade on non-public confidential information, then they are guilty of illegal insider trading. Similarly, employees of accounting, law, banking, brokerage, audit and printing firms who have access to non-public corporate information of a publicly traded company to which they provide services are prohibited from trading on such inside information. Every employee of the organization knows about the facts of any irregularity happening in the organization. So they always bothered to blow a whistle of illegal or suspected wrongdoings in the workplace. In India, the scope of laws and protection of whistleblower is limited. It is important to initiate a protection and incentives policy for those who blow whistle against illegal insider trading or any securities fraud. Whistleblowing could be used as a channel of unveiling information about illegal or unethical activities, thus helping to take a remedial step towards reduction of wrongdoing or misconduct. The alleged misconduct may be classified in many ways such as a violation of a law, rule, regulation or harm to shareholders' interest. There have been a number of recent developments in the corporate whistleblowing policy arena, which have a thrust to bring into the limelight.*

**Key Words:** *SEBI, Insider Trading, Corporate Whistleblowing, Vigil Mechanism, Equity Listing Agreement, Government Company, Auditors, Whistleblower Bounty Programme, Securities Laws, SEC, Commission, Dodd-Frank Whistleblower Programme, Securities Fraud.*

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## **INTRODUCTION**

Regulating insider trading is a herculean task and it is an extraordinarily difficult crime to prove. Apprehending an insider involved in illegal trading has grown increasingly difficult as insider trading has become sophisticated in the 21<sup>st</sup> century. With about 8000 to 9000 listed companies in India and a ratio of less than one employee per company in the entire SEBI, the Board has historically had trouble apprehending insider trading violations. It is clear that there is no dearth of statutes in India, but the concern is effective execution and implementation of such laws and regulations. Whistleblowing is the single most effective method of detecting and deterring corporate illegal insider trading. Employee disclosures are by far the most common source of insider trading detection. One of the major impediments to the detection of insider trading involves the cost of acquiring and gathering information indicating that an incident of insider trading has occurred. Insiders have the best access to such information and can discover insider trading at a much lower cost when compared to outsiders including market participants and regulators. In addition to having access to the information relating to an illegal insider trading, whistleblowers are often highly trained and sophisticated professionals with the technical expertise to understand the complex financial transactions at the core of many instances of securities fraud. Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal of the SEBI. In recognition of the important role that whistleblowers can play in the detection of insider trading, the SEBI should create a uniform legal protection and provide monetary awards for insider trading whistleblowers.

## **PROHIBITION, PREVENTION AND PENALTY FOR INSIDER TRADING IN INDIA**

- ❖ Section 195(1) of the Companies Act, 2013 and Section 12 A of the Securities and Exchange Board of India Act, 1992 read with Regulation 3 of the SEBI (Prohibition of Insider Trading) Regulations, 2015 which are effective from 15<sup>th</sup> May, 2015 deals with prohibition on insider trading of securities in India.
- ❖ Section 195(2) of the Companies Act, 2013 imposes a punishment of imprisonment for a term which may extend to 5 years or with fine which shall not be less than 5 lakh rupees but which may extend to 25 crore rupees or 3 times the amount of profits made out of insider trading, whichever is higher, or with both.



- ❖ Section 458 of the Companies Act, 2013 delegated powers to SEBI to prosecute insider trading in securities of listed companies and companies which intend to get their securities listed.
- ❖ Section 11 of the SEBI Act, 1992 empowers the Board to take measures in prohibiting insider trading in securities.
- ❖ Section 15G of the SEBI Act, 1992 provides for penalties for the offence of insider trading. This section is preventive as well as punitive as it puts the penalty for insider trading extraordinarily high at Rs.25 crore rupees or 3 times the amount of profit made out of insider trading, whichever is higher.
- ❖ Section 24 of the SEBI Act, 1992 provides for imprisonment up to a maximum of 10 years or a fine up to Rs.25 crore rupees or with both, in case of any of violations of the Act and its rules or regulations.

### **WHAT IS INSIDER TRADING?**

Insider trading means an act of subscribing, buying, selling dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent, if they are reasonably expected to have access to any non-public price sensitive information in respect of securities of company or an act of counseling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person. Price-sensitive information means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

### **WHO IS A WHISTLEBLOWER?**

Whistleblower is an informer or an informant or a private individual or two or more individuals acting jointly who provides and exposes of specific instances of misconduct like insider trading or any violations of securities laws and regulations that leads to the successful enforcement of an action to be brought by the SEBI that results in monetary sanctions. Whistleblower may be anyone who has and reports insider knowledge of illegal activities occurring in an organization. Whistleblowers can be employees, suppliers, contractors, private investors, clients or any individual who somehow becomes aware of illegal activities taking place in a business either through witnessing the behavior or being



told about it. All employees should be personally responsible for maintenance of high standards and make a report to authority concerned whenever need arises.

### **WHAT IS CORPORATE WHISTLEBLOWING?**

Whistleblowing can be defined as an act of disclosure of information by people within or outside an organization and that which is not otherwise accessible to public, generally of activities of organization that are against public interest. When a disclosure is made about the wrong doings in a business corporation, it is called corporate whistleblowing. Whistleblowers may make their allegations internally to the Audit Committee or Board of Directors within the organization called as internal whistleblowing or externally to regulators, law enforcement agencies, etc. called as external whistleblowing. Whistleblowing can be effective only when it is followed seriously and sincerely.

### **WHISTLEBLOWER BOUNTY PROGRAM IN U.S.A.**

- ♥ The securities laws in India are not so as in USA where Section 922 of Dodd-Frank Act (fully known as Dodd-Frank Wall Street Reform and Consumer Protection Act) enacted on July 21, 2010 added a new Section 21F to the Securities Exchange Act of 1934, entitled "Securities Whistleblower Incentives and Protection" which became effective on August 12, 2011 provides more substantial protections and powerful monetary incentives or rewards for corporate whistleblowers to report securities law violations to the U.S. Securities and Exchange Commission ("Commission" or "SEC").
- ♥ Pursuant to Section 21F whistleblowers who voluntarily provide the SEC with original information about violations of securities laws shall be awarded a share of between 10% and 30% of monetary sanctions ultimately imposed by the SEC where the sanctions exceed \$1 million.
- ♥ This bounty system has been proved to be a useful addition to cracking into new cases of insider trading activity in USA. The whistleblower program is intended to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws and regulations.

### **GROWTH IN WHISTLEBLOWER TIPS RECEIVED BY S.E.C.**

For each year that the whistleblower program has been in operation, the SEC has received an increasing number of whistleblower tips. Since August 2011, the SEC has received a total

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of 10,193 whistleblower tips, and in Fiscal Year 2014 alone, received 3,620 whistleblower tips.

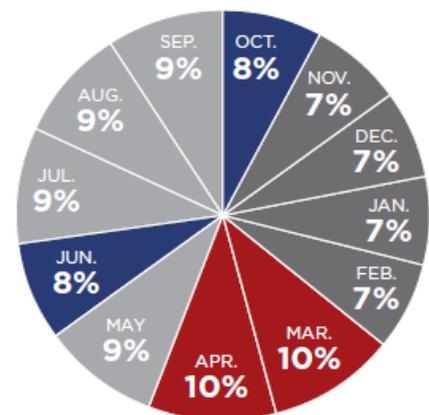
The table below shows the number of whistleblower tips received by the SEC on a yearly basis since the inception of the whistleblower program:

FY2011 <sup>39</sup>	FY2012	FY2013	FY2014
334	3,001	3,238	3,620

<sup>39</sup>Because the final rules became effective August, 12, 2011 only 7 weeks of whistleblower data is available for Fiscal Year 2011.

As reflected in the table, the number of whistleblower tips received by the SEC has increased each year the program has been in operation. From Fiscal Year 2012, the first year for which SEC have full-year data, to Fiscal Year 2014, the number of whistleblower tips received by the SEChas grown more than 20%.

The graphic shows by percentage the number of whistleblower tips the SEC received on a monthly basis during Fiscal Year 2014. As reflected in the chart, the volume of tips remained relatively steady throughout the year, with the highest number of whistleblower tips being received during the months of March and April.

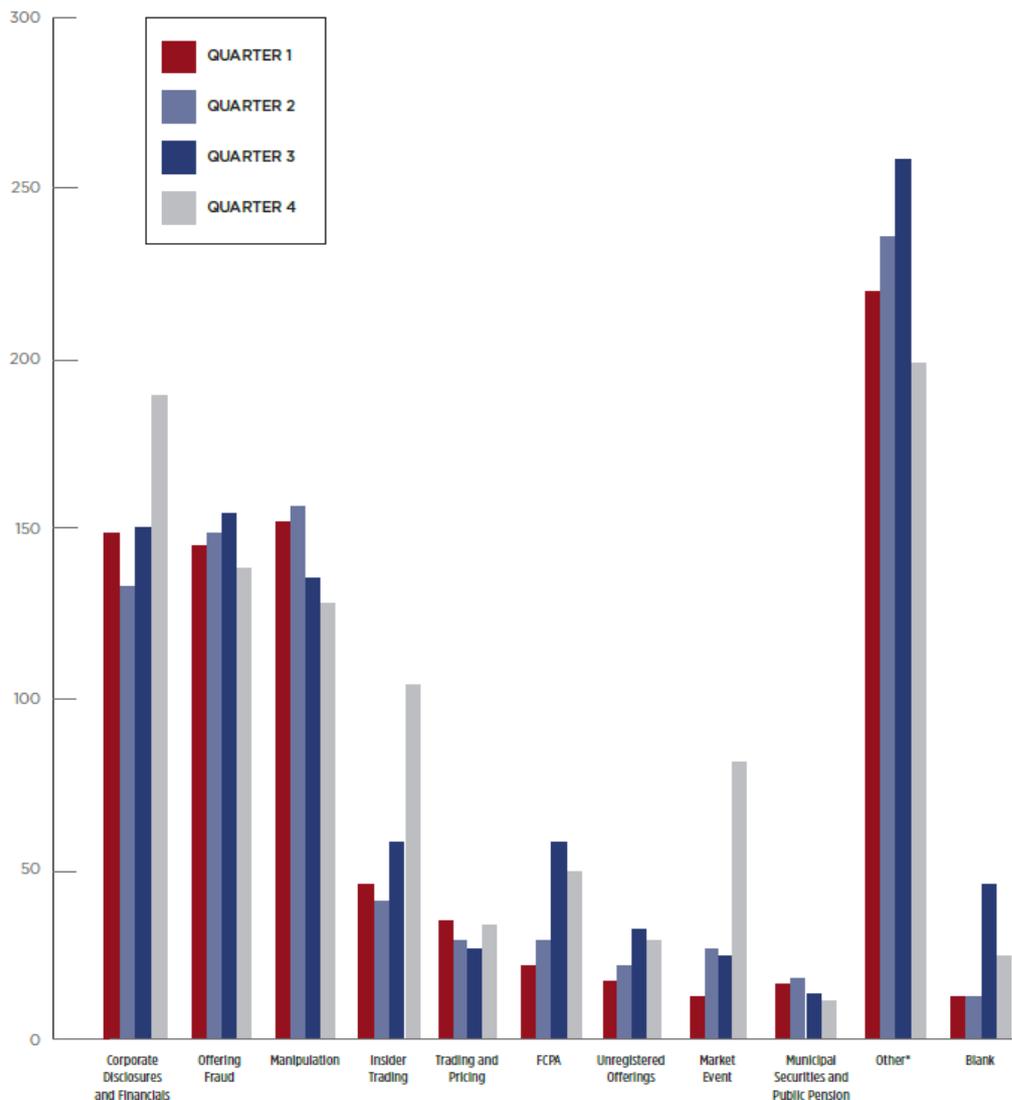


Source: The U.S. SEC 2014 Annual Report on the Dodd-Frank Whistleblower Program

### WHISTLEBLOWER ALLEGATION TYPES RECEIVED BY S.E.C.

Whether submitting their tips on Form TCR or through the online questionnaire, whistleblowers are asked to identify the nature of their complaint allegations. For Fiscal Year 2014, the most common complaint categories reported by whistleblowers included Corporate Disclosures and Financials (16.9%), Offering Fraud (16%), and Manipulation (15.5%).

The chart below reflects the number of whistleblower tips received in Fiscal Year 2014 by allegation type.



**Source: The U.S. SEC 2014 Annual Report on the Dodd-Frank Whistleblower Program**

The type of securities violation reported by whistleblowers has remained generally consistent over the last three years. Since the beginning of the program, Corporate Disclosures and Financials, Offering Fraud, and Manipulation have consistently ranked as the three highest allegation types reported by whistleblowers.

**WHISTLEBLOWER BOUNTY PROGRAM IN INDIA**

- ◆ The Indian securities laws are ineffective in incentivizing whistleblowers to bring insider trading to light. Had the statute provided truly robust protection, one would have expected an increase in the level of employee whistleblowing.



- ◆ SEBI regulations failed to offer any sort of financial incentives for whistleblowers who bring insider trading cases to light and there is no whistleblower bounty scheme at all.
- ◆ The SEBI seems to have no interest in encouraging and rewarding of whistleblowers in this direction as there was no evidence of any anemic attempt to have a bounty programme. The SEBI has directed its energies to other priorities rather than responding to and rewarding whistleblower tips.
- ◆ Where only small rewards are available, potential whistleblowers may be less likely to reveal illicit securities trading than where no bounties are available at all. Where a small bounty is available, that amount of money is not enough to compensate a potential whistleblower for the perceived downsides of bringing violation to light.
- ◆ Small bounty awards can be ineffective or even counterproductive. It may also lead a potential whistleblower to assume that someone else will blow the whistle in search of such an award. Lack of a 10% to 30% of bounty program for money recovered cases has led to negligible whistleblowing, as tipsters became complacent.
- ◆ The SEBI should allow contingency fee to lawyers who can help process the information in a whistleblower's possession in a readable and usable manner. This increases the likelihood that illegal insider trading will be quickly stopped and deterred.
- ◆ The SEBI should envisage supporting strong whistleblower protection and rewarding programs. Anti-retaliation provisions in regulations motivate employees to blow the whistle against malpractices.

## **CORPORATE WHISTLEBLOWING OR VIGIL MECHANISM IN INDIA UNDER THE COMPANIES ACT, 2013**

- **Section 177(9)** of the Companies Act, 2013 w.e.f. 1<sup>st</sup> April, 2014 requires every listed company and other prescribed classes of companies to establish a vigil mechanism for the directors and employees to report genuine concerns and grievances in such manner as prescribed under the Companies (Meetings of Board and its Powers) Rules, 2014.
- **Section 177(10)** stipulates that the vigil mechanism needs to provide for adequate safeguards against victimization of persons who use such mechanism and make



provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. The details of establishment of such mechanism are required to be disclosed by the company on its website, if any, and in the Board's report.

- **Section 134(5)** states that the report of the Board of Directors shall include a responsibility statement, *inter alia*, that the directors had taken proper and sufficient care for preventing and detecting fraud and other irregularities. Establishment of a proper whistleblower mechanism could be a step in meeting this responsibility.
- **Section 149(8)** prescribes the code of conduct for independent directors including a role and responsibility of ascertaining and ensuring that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use, reporting concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy, safeguarding the interests of all the stakeholders, particularly, the minority shareholders.

## **CORPORATE WHISTLEBLOWING OR VIGIL MECHANISM IN INDIA UNDER EQUITY LISTING AGREEMENT**

- **Revised Clause 49** of the Equity Listing Agreement of all Recognized Stock Exchanges deals with Whistleblower Policy which is effective from 1<sup>st</sup> October, 2014.
- **Clause 49(I)(A)(3)(d)** requires that all listed companies should devise a framework to avoid insider trading and abusive self-dealing.
- **Clause 49(I)(B)(1)(e)** calls for all listed companies should devise an effective whistleblower mechanism enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.
- **Clause 49(II)(F)(1)** requires establishment of vigil mechanism for directors and employees to report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy.
- **Clause 49(II)(F)(2)** envisages that this mechanism should also provide for adequate safeguards against victimization of director(s) / employee(s) who avail of the mechanism and also provide for direct access to the Chairman of the Audit Committee in exceptional cases.



- **Clause 49(II)(F)(3)** necessitates that the details of establishment of such mechanism shall be disclosed by the company on its website and in the Board's report.
- **Clause 49(III)(D)(18)** specifies the role of the Audit Committee that shall include reviewing the functioning of the whistleblower mechanism.
- **Clause 49(VIII)(X)(B)** stipulates that the companies shall submit a quarterly compliance report including the compliance status of Whistle Blower Policy to the stock exchanges within 15 days from the close of quarter in a specified format signed either by the Compliance Officer or the Chief Executive Officer of the company.
- **Clause 49(X)(A)** has suggested to include a disclosure on Whistle Blower policy and an affirmation that no personnel has been denied access to the audit committee in the report on Corporate Governance in the Annual Reports of companies, which is a mandatory requirement.

## **SIGNIFICANCE OF CORPORATE WHISTLEBLOWING POLICY**

- By adoption of the whistleblower policy by a company, the employees of that particular company have a secure mechanism to report any concerns that they may have of actual, suspected or planned wrong doings including insider trading in the company's shares involving that company or any of its subsidiaries or associate companies or any of its directors, officers or employees.
- The employees of that company have a right to report any such concerns through this policy, knowing well and full that such an act of whistleblowing on his / her part would not lead to any discrimination or recrimination against him / her.
- Any employee of that company making a report in good faith, can do so in the knowledge and confidence that the Board of Directors of that company will ensure that the act will not lead to the employee facing any recrimination, punishment, victimization or disciplinary action.
- Reports made in good faith must be based on a reasonable belief that a wrongdoing has occurred or is likely to occur. Employees of Indian entities engaged in doing business in the USA can also blow the whistle under the Dodd-Frank Act.



## **WHISTLEBLOWING AGAINST PUBLIC SERVANTS IN GOVERNMENT COMPANIES**

- ★ Whistle Blowers Protection Act, 2011 is the country's first law to protect whistleblower and to establish a mechanism to receive complaints relating to alleged wrongdoing in government companies, bodies, projects, offices. It provides adequate safeguards against victimization of the persons making bonafide complaints.
- ★ This is an Act of the Parliament of India and received the assent of the President on the 9<sup>th</sup> May, 2014. The Act became a paper tiger as it has not yet come into force till now and it can be brought into force only after necessary amendments are carried out. Rules under the Act can be notified only after the Act is brought into force.
- ★ A proposal to introduce necessary Bill for amendment of this Act is under consideration of the government. As the central government has not yet enforced this law, it has been a dampener for activists and whistleblowers alike who do not receive any kind of protection despite the existence of a law.
- ★ Unless Parliament sets a time limit for enforcement of a law that it enacts, enforcement of that law is left to the discretion of the Central Government. This Act is unique in the world as it recognizes any individual or NGO such as a private sector company as a whistleblower. This means RTI activists, anti corruption crusaders and human rights defenders can be potential whistleblowers.
- ★ As per Section 3(f) Government Company means a company referred to in section 617 of the Companies Act, 1956 which is now corresponds to the Section 2(45) of the Companies Act, 2013.
- ★ As per Section 4(1) of this Act, any public servant or any other person including any non-governmental organization, may make a public interest disclosure before the competent authority which is at present the Central or State Vigilance Commission.
- ★ As per Section 3(d)(iii) disclosure means a complaint relating to an attempt to commit or commission of a criminal offence by a public servant.
- ★ Section 3(i) of Whistle Blowers Protection Act, 2011 read with Section 2(c)(iii) of the Prevention of Corruption Act, 1988 Public Servant means any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an



authority or a body owned or controlled or aided by the Government or a Government Company as defined in section 617 of the Companies Act, 1956.

- ★ Whistle Blowers Protection Act, 2011 extends to all the government companies as well in terms of Section 19 which deals with offences by companies. This Act would encourage citizens to speak out against wrong doing in the public sector and it does not cover wrong doing in the private sector.
- ★ As per Section 19(1) where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- ★ As per Section 19(2) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. For the purpose of this section, company means any body corporate and includes a firm or other association of individuals.
- ★ The bare perusal of the Act seems inadequate and thus there are chances that the zeal of the whistleblowers to make disclosure will be affected. If the Act is implemented correctly, it could have wider implications for the private sector. It could become a useful working model for successive schemes that benefit employees from all sectors.

### **AUDITORS AS WHISTLEBLOWERS IN THE CONTEXT OF INSIDER TRADING**

- ☑ Insider trading is a securities fraud against individual shareholders who are also investors and companies as well. The company is a victim of securities fraud because it is their own information that is stolen and used for personal gain by someone else. Naturally, the shareholders at large are silent victims of latent insider trading practices by somebody who have unfair advantage over others.



- ☑ As per explanation (i) to Section 447 “fraud” in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interest of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss. Accordingly, illegal insider trading by officers or employees of the company could be construed as an **“act with an intent to injure the interests of the company or its shareholders”**.
- ☑ Auditors are no longer mere watchdogs and now they are envisaged as whistleblowers in terms of Section 143(12) of the Companies Act, 2013 which provides that if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as prescribed in the Companies (Audit and Auditors) Rules, 2014.
- ☑ As per clause (xii) of the Companies (Auditor’s Report) Order, 2015 which came into force on 10<sup>th</sup> April, 2015 issued by the Central Government by virtue of powers conferred by Section 143(11) of the Companies Act, 2013 auditor needs to report whether any fraud on or by the company has been noticed or reported during the year; if yes, the nature and the amount involved is to be indicated.
- ☑ The reporting requirement u/s. 143(12) is for the statutory auditors of the company conducting statutory audit under sections 139 to 147 of the Act and also equally applies to the cost accountant in practice, conducting cost audit u/s. 148 of the Act and to the company secretary in practice, conducting secretarial audit u/s. 204 of the Act.
- ☑ As per Rule 12(3) of the Companies (Audit and Auditors) Rules, 2014 the provisions of Section 143(12) read with Rule 13 as to reporting of frauds by the auditor shall also extend to branch auditor appointed under Section 139 to the extent it relates to the concerned branch.
- ☑ If an offence involving fraud against the company by its officers or employees that is identified or noted or uses or intends to use the information when performing audit



by the auditor in the course of providing or performing attest services or non-attest services that are not prohibited u/s. 144, is of such amount that may be considered to be material to the financial statements of the company, then the matter may become reportable to the Central Government as per the requirements of Section 143(12) read with Rule 13.

- In case a fraud has already been reported or has been identified or detected by the management or through the company's vigil or whistleblower mechanism or internal control mechanism or by the cost auditor or by the secretarial auditor of the company or by such other person and has been or is being remediated or dealt with or may have been reported by them, then the statutory auditor should review the steps taken by the management or those charged with governance with respect to the reported instance of suspected offence involving fraud and satisfy himself that the matter has been appropriately addressed and he would need to evaluate the requirement of reporting by himself as per Rule 13.
- The Companies (Amendment) Bill, 2014 which is pending approval of the Rajya Sabha and an assent of President of India, includes an amendment to the provisions of Section 143(12) which states that in case of a fraud involving lesser than a specified threshold, the auditor shall report the matter to the Audit Committee constituted u/s. 177 or to the Board of Directors, which in turn needs to disclose in the Board's report and where the amount exceeds the specified threshold, then only it shall be reported to the Central Government.

## **CONCLUSION**

In order to get more information on insider trading, the SEBI should take help from the public or anyone who can provide leads and in quid pro quo give rewards for such leads as is the practice in the United States. There should be a policy to encourage whistleblowing, as bounty programs work. The reason bounties work is that a whistleblower faces tremendous disincentives, which bounties can help offset. Most whistleblowers will be subject to some form of retaliation on the job. Various studies indicate that whistleblowers are fired, quit under duress, or are demoted. Most of whistleblowers report having been blacklisted by other companies in their industry. In addition to these economic costs, a whistleblower is likely to face severe social ostracism and experience personal hardship as one struggles to



bring insider trading to light. By adding the possibility of a bounty reform, policymakers can offset these potential costs and encourage individuals with information about insider trading to blow the whistle rather than remain silent. Bounties are particularly effective because successful whistleblowing involves not just an initial decision to expose insider trading, but persistence as that insider trading is investigated. The Indian securities laws need to address the glaring need for a bounty provision for insider trading whistleblowers. Whistleblowers who voluntarily provide original information on securities trading violations should be entitled to 10 to 30% of the sanctions obtained by the SEBI in a successful enforcement action. It is hard to work in developing rules to govern administration of a bounty program. Most whistleblowers see themselves as loyal employees, and they often blow the whistle out of a desire to help their companies. Internal reporting is not required as it would complicate both the process and the expected benefit of whistleblowing for a potential tipster. Internal reporting might delay effective intervention in cases of serious fraud. A whistleblower who complains directly to the SEBI and a member of the Board's enforcement staff contacts the company, such a call is far more likely to deter a cover-up. By imposing a requirement of internal reporting, it may delay a regulatory response to serious securities trading fraud. Since the financial markets today operate at an incredible velocity, any delay in bringing fraud to light can magnify the seriousness of fraud and the potential loss to the investing public. Early and quick law enforcement action is the key to preventing securities fraud and avoiding investor losses and the whistleblower program gives the tools to help achieve that goal.

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