

# A focus on multinationals: Whistleblower incentives on the international stage

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*"I have based the [qui tam provision] on the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." Senator Jacob Howard statement upon sponsoring the False Claims Act of 1863.*

That idea is the foundation for the reward provisions in the United States' False Claims Act, the most widely-cited law in the world that provides a financial incentive for whistleblowers who pursue the successful prosecution of fraud committed against the government.

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The False Claims Act is just one example of a legal framework offering financial incentives for individuals who blow the whistle on alleged wrongdoing. Whistleblower reward statutes first made their appearance<sup>1</sup> in England almost 1,200 years ago in a declaration issued by King Wihtred of Kent, and over the centuries rose to prominence in Medieval England due to limited police resources.

Eventually they made their way to Colonial America, addressing problems across a diverse spectrum, including incentivizing whistleblowers for information leading to the collection of duties on distilled spirits (Act of Mar. 3, 1791, Ch. 15 Section 44); the curtailment of the slave trade with foreign nations (Section 2 of the Slave Trade Act of 1794)<sup>2</sup> ("Any person violating these prohibitions was subject to a forfeiture of \$2000, half payable to any informer who would sue for it"); and of course, fraud on the government (False Claims Act<sup>3</sup>).

More recent expansions of these laws in the U.S. include significant rewards provided to whistleblowers for successful tips leading to the

government's recovery for securities violations and bribery (SEC Whistleblower Program 2011<sup>4</sup>); derivatives market violations (CFTC 2011<sup>5</sup>); motor vehicle manufacturing safety violations (MAP-21 2012<sup>6</sup>); violations of the Internal Revenue Code (IRS Whistleblower Reward Program<sup>7</sup>); and anti-money laundering violations (AMLA 2020<sup>8</sup>). There are similar programs in well over half of the American states.

While it can be fairly said that whistleblower reward programs in the U.S. are common, historically, the use of reward programs worldwide has been uneven at best, and in many cases, nonexistent. In England, for example, they fell out of favor over time and are now sparsely used.

Several years ago, the British Financial Conduct Authority ("FCA") found<sup>9</sup> payment to whistleblowers "unnecessary", "costly" and "difficult to govern". The FCA concluded that providing financial incentives to whistleblowers would be unlikely to increase the number or quality of whistleblower reports and that British whistleblowers would come forward without rewards.

Similarly, in a recent debate<sup>10</sup> within the Australian government about whether to pay rewards, one politician remarked "This wacky idea that you hand taxpayer dollars over to people who might have been involved in corporate misconduct themselves is not one that I think would sit well with most Australians."

For that matter, even the groundbreaking EU Whistleblower Directive<sup>11</sup>, set to become a baseline requirement for all EU member countries in December 2021, mandates that members provide protection for whistleblowers, but it does not require monetary rewards.

Nevertheless, reward programs have started gaining popularity in many places throughout the world, and there are grassroots<sup>12</sup> efforts underway to increase their use.

Several countries, as dispersed as Canada to Kenya, Slovakia to Montenegro, and Pakistan to Lithuania, have adopted these programs based on a belief that they provide a powerful incentive and that, from an enforcement authority perspective, they simply work.

The SEC's program is an important example in this regard, having received tips from individuals in 130 countries<sup>13</sup> and paid tens of millions in rewards to whistleblowers outside of the U.S.

Below, we explore global whistleblower reward program developments of note that impact — directly or indirectly — the private sector. They focus largely on tax, corruption, securities and antitrust issues. Rewards vary substantially, and some allow whistleblowers to remain anonymous.

## The Americas

### Canada

The first of Canada's two whistleblower incentive programs is the Offshore Tax Informant Program<sup>14</sup> (OTIP), which was enacted in 2014 and is run by the Canada Revenue Agency (CRA). The intention of this program is to obtain information regarding international tax noncompliance.

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Perhaps taking a lesson from the SEC, the CRA states that it "encourages anyone, no matter where they are in the world, to come forward if they have information about major international tax non-compliance."<sup>15</sup>

Whistleblowers may be offered monetary rewards if the information that they provide the CRA leads to the collection of more than \$100,000 CAN of lost federal tax funding. The reward amount may range from 5% to 15% of the money collected and is determined on the basis of a number of factors, such as the quality and relevance of information, the informant's cooperation and timeliness, and the informant's role in noncompliance.

The second program is the Ontario Securities Commission Whistleblower Program.<sup>16</sup> Managed by the Ontario Securities Commission Office of the Whistleblower, the program launched in 2016 and has since received "approximately 650 tips from whistleblowers across Canada and over 15 foreign jurisdictions."<sup>17</sup>

The program seeks information regarding violations of Ontario securities law and aims to protect investors from unfair practices including insider trading, abusive short selling, corporate disclosure violations, and other similar conduct.

Individuals are eligible for a reward if the information they provide the Commission leads to an administrative proceeding resulting in sanctions or voluntary payments greater than \$1 million CAD.

Rewards are between 5% and 15% of the total money recovered, and are capped at \$5 million CAD.

### Peru

Peru's National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI), with the Commission for the Defense of Free Competition and the Technical Secretariat of the Commission for the Defense of the Free Competition, amended the Competition Act in 2018<sup>18</sup> to include a rewards<sup>19</sup> program for whistleblowers.

In order to qualify for it, the information provided must relate to price fixing and commercial condition agreements, sale restrictions, manipulated allocation, or tender and procurement schemes. Informants may be awarded up to 400,000 Peruvian soles if their information proves effective and especially valuable.

### Europe

#### United Kingdom

As explained above, the Financial Conduct Authority<sup>20</sup> (FCA) does not reward whistleblowers on a broad basis. The FCA does, however, provide limited financial incentives to whistleblowers in tax evasion cases. The House of Commons Revenue and Customs<sup>21</sup> has discretion over whether tax evasion whistleblowers will be rewarded monetarily.

Also, the UK's Public Interest Disclosure Act ("PIDA") of 1998 provides whistleblowers reimbursement for any losses suffered from submitting a disclosure. The PIDA, like many laws around the world, protects whistleblowers from retaliation.

#### Lithuania

The Law on the Protection of Whistleblowers<sup>22</sup>, enacted in 2019, includes two provisions regarding compensation and rewards for whistleblowers providing information about crime and corruption, such as fraudulent accounting, asset misappropriation, abuse, influence peddling, and environmental damage. The reward provisions include compensation to whistleblowers for the loss of employment and other costs.

#### Montenegro

The Law on the Prevention of Corruption<sup>23</sup> in Montenegro rewards whistleblowers anywhere from 3% to 5% of the recovery from proceedings initiated by whistleblower information related to corruption. The initiated proceedings must lead to the recovery of funds that the Agency would not have otherwise discovered.

#### Ukraine

To incentivize the reporting of corruption, Ukraine uses a hybrid anti-retaliation/incentive payment framework. The 2019 amendment<sup>24</sup> to the country's law establishing protection<sup>25</sup> for whistleblowers requires immediate reinstatement for any whistleblowers who have been retaliated against and lost their jobs.

For whistleblowers whose reinstatement is impossible, the law requires two years' average salary. And, for those who do not want reinstatement, remuneration up to 10% of the estimated monetary damage to the state may be rewarded.

### Slovakia

Slovakia established its whistleblower incentive program with the "Protection of Economic Competition Act" in 2014, aimed at rooting out cartel activity. The country updated the program in 2019 to ensure central oversight through a newly-created Office for the Protection of Whistleblowers.

Whistleblower incentives are not confined strictly to cartels, however. Recently, on May 5, 2021, Slovakia reported<sup>26</sup> the first monetary award to a whistleblower in Continental Europe in the modern era, for the falsification of health records and hygiene inspections.

### Hungary

Article 79/A of the Hungarian Competition Act<sup>27</sup> establishes a whistleblower incentive program for "written evidence qualifying as indispensable for the establishment of a cartel infringement."

It provides one percent of the fine imposed by the Hungarian Competition Authority, not to exceed fifty million forints. The information whistleblowers provide must lead to an inspection raid and the retrieval of evidence to merit a reward.

### Africa

#### Kenya

The Kenya Revenue Authority Informer Reward Scheme<sup>28</sup> was established through the Kenya Revenue Authority Act,<sup>29</sup> Cap 469 Section 5A. The Commissioner-General determines whether whistleblowers providing information about tax evasion or fraud are entitled to a reward.

The requested information is limited to tax matters, including problems such as forged accounts, tax evasion, bribing tax officials, failure to register as a tax entity, and other similar acts. The Kenya Revenue Authority and the National Treasury increased the reward in 2020 and informants may receive 5% of the recovered taxes or 2 million KES per case, whichever amount is lower.

#### Ghana

The incentive provisions of the Ghanaian Whistleblower Act of 2006<sup>30</sup> are considered among the strongest<sup>31</sup> in Africa. The program targets economic crime; waste, misappropriation and mismanagement of public resources; degradation of the environment; and the endangerment of health and safety.

Through the program's establishment<sup>32</sup> of Citizen Complaint Centers operated by the President's Citizens Complaints Unit, whistleblowers can report bribes, poor public services and other problems at offices throughout the country, by hotline, or even online.

### Nigeria

Nigeria created its Federal Ministry of Finance Whistleblowing Policy<sup>33</sup> in 2016. Considered by some a success<sup>34</sup>, it addresses<sup>35</sup> problems such as mismanagement or misappropriation of public funds and assets; diversion of revenues; financial malpractice and fraud; tax evasion; collecting or soliciting bribes; procurement fraud and corruption.

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Whistleblowers may receive between 2.5% and 5% of the recovered funds as long as the information provided to the government is unknown to the government and leads to the recovery of concealed assets.

### Asia

#### South Korea

South Korea<sup>36</sup> has several separate whistleblower incentive programs, three of which are worth noting here.

First, under the Act on the Prevention of Corruption<sup>37</sup>, South Korea's Anticorruption and Civil Right Commission ("ACRC") "will provide whistleblowers with rewards of up to KRW 3 billion (about USD 3 million) if their report of corruption has contributed directly to recovering or increasing revenues or reducing expenditures for public agencies."

Second, under the Act on the Protection of Public Interest Whistleblowers<sup>38</sup>, the ACRC will also pay up to KRW 3 billion if the whistleblower's report exposes "an act that infringes on the health safety of the public, the environment, consumer interests and fair competition."

Third, the long-running Tax Evasion Informant Reward Program, managed by the National Tax Service of South Korea (NTS), focuses on tax evasion and tax violations.

The NTS may reward whistleblowers for information that leads to the imposition of sanctions exceeding 50 million KRW with 5% to 20% of the collected proceeds.

#### Philippines

The Philippines does not have an official whistleblower incentive program. However, the Presidential Anti-Corruption Commission (PACC) recently incentivized whistleblowers to come forward with information in response to several matters.

In 2018<sup>39</sup>, the PACC initiated an unofficial whistleblower incentive program seeking information regarding wealth received by individuals who were engaged in corruption. Whistleblowers were offered up to 25% of the total wealth the individual improperly earned.

In 2020<sup>40</sup>, the PACC launched another incentive initiative, encouraging individuals to provide the PACC with information about public officials stealing public COVID-19 funding. Informants were promised 30,000 PHP and protection for naming corrupt officials proven to pocket emergency relief funds.

### Malaysia

The Parliament of Malaysia enacted the Whistleblower Protection Act of 2010<sup>41</sup> to institute a reward program for whistleblowers. Under Section 26, rewards may be paid for “any disclosure of improper conduct” or “any complaint of detrimental action in reprisal for a disclosure of improper conduct” as determined by enforcement agencies under the Minister’s authority. The program aims to combat corruption in the public and private sectors.

### Taiwan

Taiwan’s whistleblower programs in the private sector include one that is overseen by the Financial Supervisory Commission (“FSC”) targeting “illegal financial activities”, and another that is overseen by the Agency Against Corruption as outlined<sup>42</sup> in the Anti-Corruption Informant Rewards and Protection Regulation., targeting corruption and malfeasance.

In 2021, the FSC increased its incentive amounts ten-fold<sup>43</sup> for major crimes, and five-fold for minor ones.

### Pakistan

The Competition Commission of Pakistan (“CCP”) instituted a Reward Payment to Informants Scheme<sup>44</sup> to incentivize whistleblowers to report cartel and other anticompetitive behavior to the CCP. This program provides rewards, decided entirely within the CCP’s discretion, based on the “veracity and usefulness of the information provided.”

Whistleblowers may receive<sup>45</sup> between 200,000 and 5 million Pakistani Rupees for their efforts. Pakistan also has a tax whistleblower initiative, which rewards whistleblowers for providing information about the failure of others to declare certain properties<sup>46</sup>

### Closing thoughts

While it is not yet certain that whistleblower incentive programs will proliferate globally, recent trends indicate that further growth is likely, especially if the U.S. is an example.

As a May 2021 Harvard Business School study<sup>47</sup> “Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers” found, “[G]reater incentives increase the number of lawsuits filed with the regulator, the regulator’s investigation length, the percentage of intervened lawsuits, and the percentage of settled lawsuits.”

Furthermore, although the EU Directive does not itself call for monetary rewards, it will result in an increased number of countries with whistleblower programs, and some of those programs will likely have a reward component. The number of programs implemented throughout the first two decades of the twenty-first century alone reflect a heightened global consensus.

### Notes

<sup>1</sup> <https://bit.ly/3rEbZWt>

<sup>2</sup> <https://bit.ly/3j1zjte>

<sup>3</sup> <https://bit.ly/2WAJNsh>

<sup>4</sup> <https://bit.ly/3lkOWPx>

<sup>5</sup> <https://bit.ly/3x67QLX>

<sup>6</sup> <https://bit.ly/3iceYCy>

<sup>7</sup> <https://bit.ly/3yd2HTV>

<sup>8</sup> <https://bit.ly/3l634fa>

<sup>9</sup> <https://bit.ly/3i9WXVd>

<sup>10</sup> <https://ab.co/3z1284P>

<sup>11</sup> <https://bit.ly/3f7DDWS>

<sup>12</sup> <https://bit.ly/2Vis1sO>

<sup>13</sup> <https://bit.ly/3f9Asxl>

<sup>14</sup> <https://bit.ly/3f5TCVd>

<sup>15</sup> *Id.*

<sup>16</sup> <https://bit.ly/3l3e3Gg>

<sup>17</sup> <https://bit.ly/3f35B60>

<sup>18</sup> <https://bit.ly/3768XAR>

<sup>19</sup> <https://bit.ly/3f351lq>

<sup>20</sup> <https://bit.ly/3yb5eO9>

<sup>21</sup> <https://bit.ly/3xfiUqe>

<sup>22</sup> <https://bit.ly/3x8w4VR>

<sup>23</sup> <https://bit.ly/3j4hGt4>

<sup>24</sup> <https://bit.ly/3yaS3gt>

<sup>25</sup> <https://bit.ly/2Wr6dMh>

<sup>26</sup> <https://bit.ly/3zl2LLJ>

<sup>27</sup> <https://bit.ly/3ifVAoh>

<sup>28</sup> <https://bit.ly/3i66dtA>

<sup>29</sup> <https://bit.ly/3l36nE1>

<sup>30</sup> <https://bit.ly/3i8ywYc>

<sup>31</sup> <https://bit.ly/3f7Etmq>

<sup>32</sup> <https://bit.ly/3iYEE4D>

<sup>33</sup> <https://bit.ly/3BMYbhb>

<sup>34</sup> <https://bit.ly/373rs9b>

<sup>35</sup> <https://bit.ly/3f9B5ay>

<sup>36</sup> <https://bit.ly/3f6TtAU>

<sup>37</sup> <https://bit.ly/3BUijOb>

<sup>38</sup> <https://bit.ly/3BUijOb>

<sup>39</sup> <https://bit.ly/3iVBoqN>

<sup>40</sup> <https://bit.ly/3x9dOMb>

<sup>41</sup> <https://bit.ly/3yaSyal>

<sup>42</sup> <https://bit.ly/3iWGMdt>

<sup>43</sup> <https://bit.ly/3yb5L2B>

<sup>44</sup> <https://bit.ly/3zl3rkf>

<sup>45</sup> <https://bit.ly/3yedptb>

<sup>46</sup> <https://bit.ly/3BLjEHf>

<sup>47</sup> <https://bit.ly/3yoXHF7>

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