

## Corporate crime

The age of the whistleblower

**Life is getting better for those who expose wrongdoing, but companies continue to fight back—often against their own interests**

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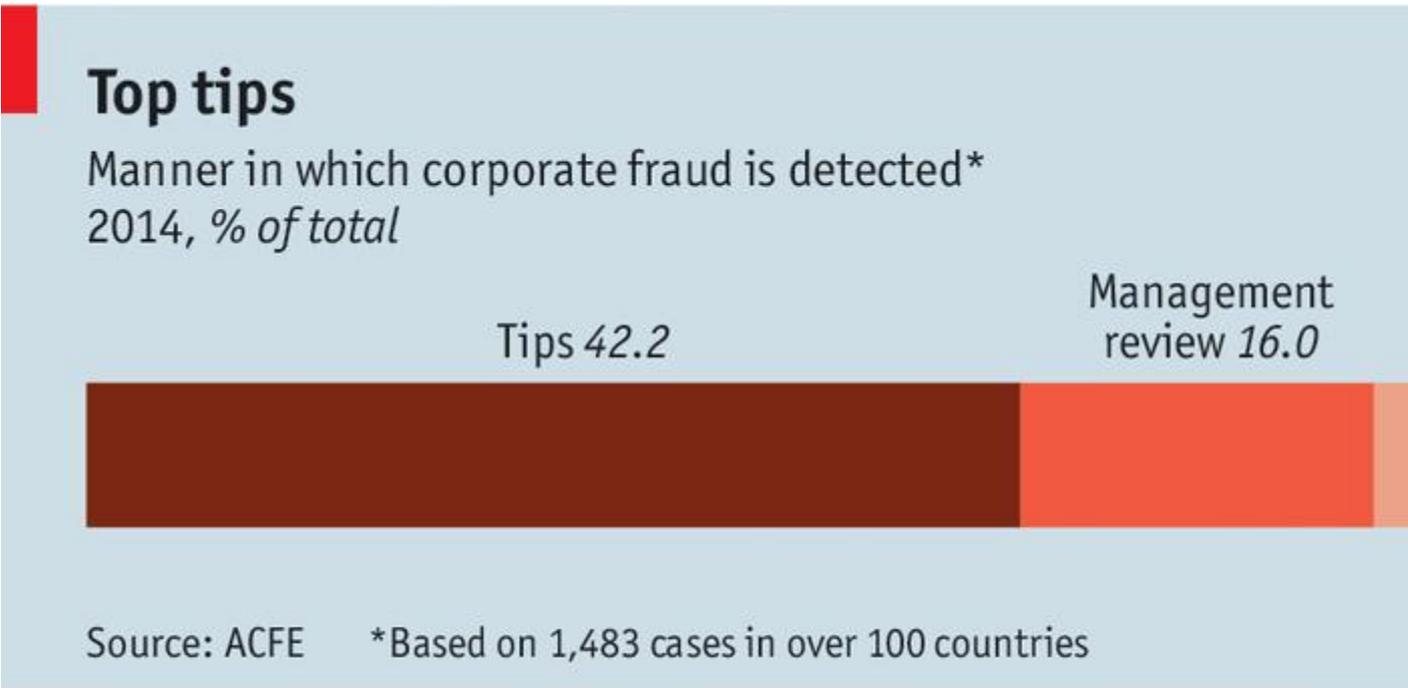
LISTEN carefully and you can hear the sound of corporate lawyers rummaging through dirty laundry. Volkswagen, caught up in two devastating emissions scandals, is belatedly embracing whistleblowers. Desperate to put the mess behind it, the carmaker set a deadline of this week for employees to come forward with information, even if self-incriminating, in return for avoiding dismissal or damages claims (but not protection from prosecution).

Whistleblowers have already played a part in exposing the company's exaggerated claims on carbon-dioxide emissions—though no one from within VW lifted the lid on its other scandal, the fiddling of its vehicles' output of nitrogen oxides during tests. That was uncovered by an NGO, possibly with help from leakers in the European Commission.

As VW began to process the results of its amnesty, whistleblowers were making headlines elsewhere, too. It was reported that Takata, a Japanese firm mired in scandal over defective airbags, might have avoided the worst of its problems if it had paid more attention to American employees who rang alarm

bells a decade ago. An investigation aired this week by BBC Television alleged that British American Tobacco had bribed officials from a World Health Organisation tobacco-control programme. Its conclusions were supported by documents provided by a manager who had participated in the alleged palm-greasing. BAT said it does not tolerate corruption.

Whistleblowing has been on the increase since the 2007-08 financial crisis sparked a crackdown on corporate corruption and collusion. The number of tips received by the “Whistleblower Office” of America’s Securities and Exchange Commission (SEC) has risen steadily since it was opened in 2011, to nearly 4,000 a year. “We live in the age of the whistleblower,” says Jordan Thomas, a former SEC official now at Labaton Sucharow, a law firm. Surveys by the Association of Certified Fraud Examiners, a global group for financial sleuths, consistently find tips to be the leading mechanism for unearthing wrongdoing, well ahead of audits or regulatory reviews (see chart 1).



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Despite this, companies have often punished rather than praised whistleblowers. “The institutional equivalent of animal instinct is to strike back,” says Tom Devine, legal director of the Government Accountability Project, who

has worked with 6,000 whistleblowers in the public and private sector since the 1970s.

Take the case of Paul Moore, who was sacked as head of regulatory risk at HBOS in 2004 after warning that the British bank was lending recklessly, and then took his complaints public. The scrutiny that followed caused Mr Moore to battle depression and alcoholism; he has said he “wouldn’t have had the courage to do it” if he had known the misery it would cause. He was vindicated last month, with publication of a stinging official report on the failures that led to the bail-out of HBOS. Partly in response to that debacle, Britain’s financial regulator now insists that the firms it oversees explicitly tell staff they can complain directly to regulators, and that they nominate a senior manager as a “whistleblower’s champion”.

According to one recent study, Britain is the third-best of the G20 large economies in terms of legal protection for whistleblowers (see chart 2). Enforcement of laws matters, too, of course. Few would say Turkey is a kinder climate for whistleblowers than Canada, which has weaker protections but applies them more assiduously. Europe is “where the action is” when it comes to improving protections, says Mr Devine. What has helped is a strong set of “best practice” guidelines from the Council of Europe, a club of 47 western and eastern European states, as have pro-whistleblower rulings from the council’s judicial arm, the European Court of Human Rights. Newer entrants to the 28-country European Union, such as Romania, had to adopt high standards as a condition of joining. The situation among older members is patchier. Protections are particularly weak in Germany, where whistleblowers who go public after failing to get a response internally face defamation suits, says Anja Osterhaus of Transparency International. Non-EU Switzerland is another with an unforgiving climate (see article).

## Protecting the messenger

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Rating of private-sector whistleblowing laws  
Selected countries, 2014, *lowest score=best*



Source: "Whistleblower Protection Laws in G20 Countries", by Simon Wolfe *et al*, Transparency International Australia, 2014

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America is the best place for whistleblowers. The SEC's programme, created by the Dodd-Frank financial-reform act of 2010, is arguably the strongest of the more than 40 federal whistleblower-friendly laws on the books. It rests on three pillars: job protection, anonymity and bounties. It has handed out 22 awards, averaging \$2.5m; these can rise to 30% of any fines that get levied on the employer. Though the programme is not marketed abroad, it has taken on

a global hue: tips have come in from 96 countries, and several of the awards have gone to foreigners. In October a court ruled that whistleblowers can sue individual board members as well as the firm, if these were personally involved in any mistreatment of them.

America is not always kind to whistleblowers. It has given some public-sector and national-security leakers a torrid time. And it sometimes acts inconsistently. Bradley Birkenfeld, who provided American authorities with vital information about Swiss banks and their tax-evading clients, won a (taxable) \$104m award from the IRS. But the Department of Justice prosecuted him. His 66 months of prison and probation ended on November 28th.

Europeans have debated but so far rejected the idea of American-style bounties. “The mentality here is different,” says a London-based lawyer. “The Wild West, bring-me-the-head approach would undermine rather than bolster support” for whistleblowers. The SEC has admitted to having a problem with “serial submitters”, who file dozens of spurious claims in the hope that one will lead to a payout.

Though official encouragement of whistleblowers is growing, corporate retaliation remains a problem. Of those who report internally first, the number who perceive that they suffered retribution has been steady at around 20% since 2011 and is higher than in 2007, according to America’s National Business Ethics Survey.

The confidentiality agreements that many firms ask employees to sign are another disincentive. Examples include preventing them from consulting outside lawyers, requiring notice before they report anything to an outside body and demanding waivers of any future whistleblower awards. In one survey almost a fifth of respondents felt their employer’s confidentiality policies obstructed the reporting of potentially illegal activity to law enforcers.

In America, such agreements are legal unless they are designed to stifle whistleblowing, as opposed to, say, protecting trade secrets. The SEC considers this area a priority and this year brought its first cases against firms

deemed to have gagged or retaliated against workers. Among those fined was KBR, an engineering group, for making staff sign agreements which said they could be sacked if they discussed an internal investigation with outside parties without the firm's approval. "The SEC has sent a strong message about restrictive language. It isn't messing around," says Mr Thomas. But Mr Devine fears that companies are growing more creative in how they craft agreements to sidestep restrictions. "If there's one thing I've learnt in over 30 years, it's that it is fatal for whistleblowers' legal rights to remain static," he says.

Ideally, firms would put in place a formal system for hearing and noting complaints—for their own sakes, as well as those of whistleblowers. When people fail to report wrongdoing, the main reason is often not the fear of retaliation but the suspicion that nothing will be done about it. Companies often see whistleblowers as motivated by revenge or greed. But studies consistently show that most are driven to right a wrong. That is why more than 90% of them sound the alarm internally first, rather than running straight to the authorities or newspapers. Given the choice, they would rather warn than accuse.

So, to stifle whistleblowing is to harm the business. Bad news tends to come out eventually, and looks worse if it appears that bosses tried to suppress it. Apart from which, wrongdoing is less likely to occur in the first place if employees know that their bosses are more inclined to hug a whistleblower than to put him in a headlock.

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