VII. A CRITICAL ANALYSIS OF THE INFORMANT MECHANISM UNDER THE SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015 VIS-À-VIS GLOBAL BEST PRACTICES ON WHISTLEBLOWING

- Sagnik Sarkar*

ABSTRACT

Whistleblowers perform a key social function. They expose wrongs that would otherwise have been difficult, if not possible, for State authorities to detect. This is the advantage of their proximity to the internal affairs of the organization they were, or are, employed with. Whistleblowers thus play a key role in upholding public ethics, by contributing to the detection of, and the enforcement of remediation measures and sanctions against, wrongs. Whistleblowing is particularly useful for securities law enforcement actions. These actions tend to rely heavily on circumstantial evidence, which is often difficult for a regulator to procure without disclosure from a whistleblower. The informant mechanism under the Regulations allows whistleblowers to report information concerning insider trading directly to SEBI. While the mechanism is well-intentioned, it falls short of global best practices on whistleblowing on multiple counts. Firstly, it fails to vest in employees a right to refuse to follow a direction from a superior reasonably believed to be unlawful. Secondly, it imposes an unwarranted burden on the informant to satisfy themselves that the conduct they are disclosing is wrongful. Thirdly, there is inadequate guidance on the extent to which SEBI will keep the informant's identity in confidence. Fourthly, the mechanism omits to protect the family members of informants against retribution. Fifthly, a protected person cannot seek a remedy against retribution as a matter of right. Finally, the burden of proof necessary to prove retaliation appears to be disproportionately high, with the odds of success stacked against the claimant.

* The author is a graduate of B.A. LL.B. (Hons.) from Tamil Nadu National Law University, Tiruchirappalli. Views stated in this paper are personal.

I. INTRODUCTION

There is no global consensus on the precise meaning of 'whistleblowing' and a 'whistleblower'.[1] However, there seems to be some common ground in the understanding of the term in a legal sense.[2] The general, international legal consensus seems to be that 'whistleblowing' refers to the act of: (*i*) a present, or former, an employee of an organization; (*ii*) disclosing information of an alleged wrong; (*iii*) by, or in, that organization; (*iv*) to a government authority.[3] The person who engages in this activity is a 'whistleblower'. Whistleblowers

[1] Organization for Economic Cooperation and Development (OECD), 'Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (OCED 2012) <https://www.oecd.org/corruption/48972967.pdf> accessed 27 October 2022, 7-8; United Nations Office on Drugs and Crime (UNODC), 'Resource Guide on Good Practices in the Protection of Reporting Persons' (UNODC 2015) <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf> accessed 27 October 2022, 8-10.

[2] OCED (n 1); UNODC (n 1).

[3] ibid; The United Nations Convention Against Corruption 2003, art 33; The Council of Europe Civil Law Convention on Corruption 1999, art 9; Council of Europe, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Council Res OECD/LEGAL/0378 (November 26, 2021), para. XXII; Bryan A. Gardner, *Black's Law Dictionary* 1627 (8th edn, Thomson West 2004).

may sometimes be described in legal instruments using other nomenclature.[4] The whistleblower, because of their past or present position in the organization in question, was or is privy to information about the alleged wrong that is not generally known to the public.[5] By engaging in whistleblowing, they bring this information to the knowledge of a government authority. This puts the government authority at notice of a probable wrong and allows them to initiate enforcement proceedings to remediate the effects of, and/or punish that conduct. Whistleblowers perform a key social function. They expose wrongs which would otherwise have been difficult, if not possible, for government authorities to detect.[6] This is the advantage of their proximity to the internal affairs of the organization they were, or are, employed with. Whistleblowers thus play a key role in upholding public ethics, by significantly increasing the detection of, and the enforcement of remediation measures and sanctions against, wrongs.[7] Several judicial precedents have recognized that the very act of whistleblowing, and therefore the conduct of whistleblowers, is in the public interest.[8] Whistleblowing is protected as a form of speech under the right to freedom of speech and expression and is thus deserving of protection

[4] OCED (n 1); UNODC (n 1).
[5] ibid.
[6] UNODC (n 1) 3-5; Iheb Chalouat, Carlos Carrión-Crespo and Margherita Licata, 'Law and practice on protecting whistle-blowers in the public and financial services sectors' 2-3 (ILO 2019); International Bar Association (IBA) and Government Accountability Project, 'Are whistleblowing laws working? A global study of whistleblower protection litigation' (IBA 2021) <https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55> accessed 27 October 2022, 2.
[7] UNODC (n 1) 3-5; Chalouat (n 6); IBA (n 6) 2; Transparency International, 'International Principles for Whistleblower Legislation' (Transparency International 2013) <https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf> accessed 27 October 2022.
[8] *Indirect Tax Practitioners Association v R K Jain* (2010) 8 SCC 281 (India); *Lane v Franks* 573 US 228 (2014); *Department of Homeland Security v MacLean* 574 US 383 (2015); *Guja v. Moldova* App No 14277/04 (ECtHR, 12 February 2008); *Marchenko v Ukraine* App No 4063/04 (ECtHR, 19 February 2009); *Kudeshkina v Russia* App No 29492/05 (ECtHR, 26 February 2009); *Heinisch v Germany* App No 28274/08 (ECtHR, 21 July 2011); *Bucur v. Romania* App No 40238/02 (ECtHR, 08 January 2013).

by the State.[9] In cases where the benefits from the disclosure outweigh its harms, and where there is no effective alternative to redress the conduct being disclosed, the whistleblower has a constitutional or human right to be protected against any form of retribution— not just by the State but by any private person too.[10] In such a case, retribution gives the whistleblower a right to seek redress under constitutional law or human rights law.[11] In the context of securities law specifically, whistleblowing is especially useful as an aid to the regulation of the securities market consistent with the free market ethics of ensuring that the market offers every participant a level playing field.[12] Experience shows that enforcement actions for violations of securities law are heavily reliant on circumstantial evidence.[13] Circumstantial evidence, by its nature, is quite difficult to detect and collect, without some aid from an insider in the target of the investigation.[14] This makes securities enforcement actions

[9] *Indirect Tax Practitioners Association* (n 8); *Lane* (n 8); *MacLean* (n 8); *Guja* (n 8); *Kudeshkina* (n 8); *Heinisch* (n 8); *Marchenko* (n 8); *Bucur* (n 8).
[10] ibid.
[11] ibid.
[12] Chester S. Spatt, 'An Informal Perspective on the Economics and Regulation of Securities Markets' (2010) 2(1) Annual Review of Financial Economics 127; Paul G. Mahoney, 'The Economics of Securities Regulation: A Survey' (2021) 13(1) Foundations and Trends in Finance 1, 8-13; US Securities and Exchange Commission, 'Remarks of Commissioner J. Carter Bessee, Jr., U.S. Securities and Exchange Commission: The Role of Ethics in Protecting the U.S. Capital Markets: AIMR Conference on Ethics, Washington, D.C., November 30, 1993' (SEC 1993) <https://www.sec.gov/news/speech/1993/113093beese.pdf> (accessed 27 October 2022).
[13] US Securities and Exchange Commission, 'Speech by SEC Staff: Insider Trading – A U.S. Perspective: Remarks by Thomas C. Newkirk Associate Director, Division of Enforcement, Melissa A. Robertson, Senior Counsel, Division of Enforcement, U.S. Securities & Exchange Commission: 16th International Symposium on Economic Crime Jesus College, Cambridge, England, September 19, 1998' (SEC 1998) <https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm> accessed 27 October 2022; Shruti Rajan and Vidhi Shah, 'The Use of Circumstantial Evidence in Securities Law Enforcement', *IndiaCorpLaw*, 16 September 2020 <https://indiacorplaw.in/2020/09/the-use-of-circumstantial-evidence-in-securities-law-enforcement.html> accessed 27 October 2022.
[14] Stephen Hall and Jason Grimes, 'SEC's Whistleblower Program: A $5 Billion Success Story With a Bright Future", Better Markets, January 20, 2022' <https://bettermarkets.org/wp-content/uploads/2022/01/BetterMarkets_Report_SECs_Whistleblower_Program_January_2

relatively harder to prosecute, compared to prosecution for traditional crimes and other wrongs which are not as reliant on circumstantial evidence. Thus, the presence of a whistleblower with knowledge of inside information concerning a violation of securities law is especially useful.[15] Therefore, it is not surprising that securities market regulators across the world have established mechanisms for whistleblowers to bring information about alleged violations to their notice. These regulators, especially the US Securities and Exchange Commission, have experienced significant success in prosecuting violations of securities law based on information received under their whistleblowing mechanisms.[16] From a public ethics perspective, whistleblowing is a social good. It is therefore prudent to implement policy measures that can incentivize whistleblowing. These may be established through the constitution of a whistleblower mechanism. There seem to be two primary challenges any whistleblower mechanism must tackle. *Firstly*, the act of whistleblowing itself must be effective.[17] Whistleblowing is socially useful only if it leads to the discovery of actionable information that a government authority may reasonably rely on to commence an enforcement action. It is axiomatic that this requires the information disclosed to meet a minimum

022.pdf> accessed 27 October 2022; Jason Zuckerman and Matthew Stock, 'Better Markets' Report Documents the Success of the SEC Whistleblower Program', (*The National Law Review*, 21 January 2022) <https://www.natlawreview.com/article/better-markets-report-documents-success-sec-whistleblower-program> accessed 27 October 2022.

[15] Hall (n 14); Zuckerman (n 14).

[16] 'Speech: The SEC as the Whistleblower's Advocate' (SEC, 2015) <https://www.sec.gov/news/speech/chair-white-remarks-garrett-institute> accessed 05 April 2023; SEC Office of the Whistleblower, 'SEC Whistleblower Office Announces Results for FY 2022' (SEC, 2023) <https://www.sec.gov/files/2022_ow_ar.pdf> accessed 05 April 2023; SEC Office of the Inspector-General, 'Evaluation of the SEC's Whistleblower Program' (SEC, 2013) <https://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf> accessed 05 April 2023.

[17] International Bar Association (IBA) and Government Accountability Project, 'Are whistleblowing laws working? A global study of whistleblower protection litigation' (IBA 2021) <https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55> accessed 27 October 2022, 8.

standard of quality. *Secondly*, despite the general ethical soundness of the very act of whistleblowing, whistleblowers themselves face the threat of victimization. A whistleblower, by definition, reports to the government a conduct for which their employer can potentially be held liable. Hence, it is not surprising that, quite often, the employer engages in retribution by exercising their power over the whistleblower by virtue of the subsisting employment relationship between the two. Thus, there is a consensus that whistleblower mechanisms must be designed to protect whistleblowers from victimization for their conduct.[18] Hence, the object of a good whistleblower mechanism should be to maximize the achievement of both these policy objectives. In India, securities law was lacking a whistleblowing mechanism for a significant time. A potent aid to enforcement was thus lacking. A whistleblower mechanism was introduced in 2019 by an amendment[19] to the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.[20] Through this amendment, SEBI inserted Chapter III-A in these Regulations. The Chapter establishes an informant mechanism for reporting alleged instances of insider trading to SEBI. It contains provisions regarding the reporting mechanism, protecting the confidentiality of the

[18] Transparency International, 'International Principles for Whistleblower Legislation' (Transparency International 2013) <https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf> accessed 27 October 2022, 2-6; Organization for Economic Cooperation and Development (OECD), 'The Role of Whistleblowers and Whistleblower Protection' (OCED 2016) <https://www.oecd.org/corruption/anti-bribery/OECD-The-Role-of-Whistleblowers-in-the-Detection-of-Foreign-Bribery.pdf> accessed 27 October 2022; Iheb Chalouat, Carlos Carrión-Crespo and Margherita Licata, 'Law and practice on protecting whistle-blowers in the public and financial services sectors' (ILO 2019), 1-5; Council of Europe, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Council Res OECD/LEGAL/0378 (November 26, 2021), para. XXI, XXII; IBA (n 16) at 8.

[19] The Securities and Exchange Board of India (Prohibition of Insider Trading) (Third Amendment) Regulations 2019.

[20] The Securities and Exchange Board of India (Prevention of Insider Trading) Regulations 2015.

informant's identity, and rewards for the informant. No literature has comprehensively, and critically, analyzed the extent to which the informant mechanism under these Regulations was able to attain the policy objectives of a good whistleblowing mechanism. The available literature seems to be mere piecemeal comments on the informant mechanism, and none of them delineates the yardstick by which the mechanism has been analyzed. [21] This paper intends to fill that gap. The object of this paper is to critically analyse the informant mechanism established under the Regulations. The author hypothesises that the informant mechanism is not consistent with the global best practices on good whistleblower mechanisms. In Part II, the paper describes the best practices for establishing an effective whistleblowing mechanism, gathered from the learned experience of well-functioning whistleblower mechanisms across the world. In Part III, the author studies the features of the informant mechanism under the Regulations and analyzes the extent to which its features conform to the best practices discovered in the last Part. Finally, in Part IV, the author summarizes their findings, tests the hypothesis, and recommends amendments to the informant mechanism to increase its effectiveness.

[21] Dhruti Lunker and Isiri SD, 'Reward for Revelation: A Critical Analysis on SEBI's Informant Mechanism', (*NUALS Law Journal Blog*, 08 May 2020) <https://nualslawjournal.com/2020/05/08/reward-for-revelation-a-critical-analysis-on-sebis-informant-mechanism/> accessed 27 October 2022; *Tushar Oberoy, 'SEBI's Informant Mechanism: Impact of the Incentives on Internal Compliance Programs', (NLIU CBCL Blog, 01 August 2020)* <https://cbcl.nliu.ac.in/capital-markets-and-securities-law/sebis-informant-mechanism-impact-of-the-incentives-on-internal-compliance-programs/> *accessed 27 October 2022; Preet Choksi, 'Informant mechanism in India and whistleblower in USA: A step towards curbing insider trading', (NLUJ Law Review Blog, 19 March 2021)* <http://www.nlujlawreview.in/informant-mechanism-in-india-and-whistleblower-in-usa-a-step-towards-curbing-insider-trading/> *accessed 27 October 2022.*

II. HOW TO DEVELOP A GOOD WHISTLEBLOWER MECHANISM: LESSONS FROM THE WORLD

There is ample, authoritative literature that has studied whistleblower mechanisms across the world. Each of these works has succinctly distilled the best practices that we can gather from global experience in designing a good whistleblower mechanism. One of the most comprehensive studies on this subject is a joint report by the International Bar Association and the Government Accountability Project.[22] This report has studied whistleblower protection legislation, and related litigation, across the world. There is another study, conducted by the International Labour Organization (ILO),[23] that has studied trends in whistleblower mechanisms specifically in the public sector and the financial services sector across the world. The UN Office on Drugs and Crime (UNODC) has published a resource guide[24] that has identified global best practices for designing a good whistleblower mechanism, based on a global review of whistleblower mechanisms. Similarly, the G20 Anti-Corruption Plan has published a report identifying global best practices in designing whistleblower mechanisms.[25] There is a remarkable similarity in the recommendations contained in each of these works. In this part, the author will

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[22] International Bar Association (IBA) and Government Accountability Project, 'Are whistleblowing laws working? A global study of whistleblower protection litigation' (IBA 2021) <https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55> accessed 27 October 2022 ('IBA-GAP Study').

[23] Iheb Chalouat, Carlos Carrión-Crespo and Margherita Licata, 'Law and practice on protecting whistle-blowers in the public and financial services sectors' (ILO 2019) ('ILO Study').

[24] United Nations Office on Drugs and Crime (UNODC), 'Resource Guide on Good Practices in the Protection of Reporting Persons' (2015) <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf> accessed 27 October 2022 ('UNODC Guide').

[25] Organization for Economic Cooperation and Development (OECD), 'Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (OECD 2012) <https://www.oecd.org/corruption/48972967.pdf> accessed 27 October 2022 ('OECD Study').

briefly describe these recommendations. For convenience, the author has divided the recommendations into three distinct stages, depending on which stage in the typical whistleblowing process each recommendation pertains to: (*a*) pre-disclosure; *(b*) during disclosure; and (*c*) post-disclosure.

A. Best Practices in the Pre-Disclosure Stage

The role of a formal whistleblower mechanism begins even before a whistleblower makes a disclosure. The policy measures pertaining to this stage lay the groundwork for effective whistleblowing. The best practices for designing the pre-disclosure stage, in no particular order, are the following.

1. Definition of Protected Disclosures

The first challenge of designing a good mechanism is definitional—what constitutes whistleblowing, and who is a whistleblower? This is a two-stage process. *Firstly*, we identify the types of wrongs regarding which whistleblowing can be allowed. Ideally, this scope should be as broad as possible.[26] *Secondly*, one should define whistleblowing to encompass all situations in which a whistleblower discloses information that provides a reasonable basis to believe that one of those types of wrongdoing has occurred, is occurring, or is about to occur.[27] On the contrary, the worst standard to apply

[26] IBA-GAP Study, 13-16; ILO Study, 14-18; UNODC Guide, 22-26; Transparency International, 'International Principles for Whistleblower Legislation' (Transparency International 2013) <https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf> accessed 27 October 2022 4-5 ('Transparency International Principles').

[27] IBA-GAP Study, 13-16; ILO Study, 14-18; UNODC Guide, 22-26; Transparency International Principles; Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law ('EU Whistleblower Protection Directive'), art 15(1)(b); The Public Interest Disclosure Act 1998, s 23, 43G (UK); The Public Interest Disclosure Act 2013, s 26, 28 (Australia); 18 USC § 1514(a).

(instead of reasonable basis to believe) is a requirement of good faith.[28] A requirement to demonstrate good faith places a difficult evidentiary burden for the whistleblower to satisfy, in addition to the troubles they are already subject to, by virtue of their identity.[29] This has a chilling effect on whistleblowing. A 'reasonable basis to believe the standard is better because it allows a whistleblower to make "honest mistakes" while incentivizing the disclosure of all information that may be potentially useful to a regulator at the same time.[30]

2. Broad Definition of 'Employee'

As explained above, whistleblowing, in a legal sense, is typically defined to restrict the scope of a 'whistleblower' to an 'employee'. In practice, whistleblower mechanisms should define this term broadly, to include not only employees in the traditional sense but also persons in quasi-employment relationships— such as contractors, probationers, interns, etc.[31] The scope should be extended to all persons who, by virtue of their proximity to the internal affairs of the organization in question, are as likely as traditional employees to be privy to inside information of potential wrongs.[32]

3. Right to Refuse Violation of Law

The reality of the workplace is that, in many situations, an employee may be directed by a superior to conduct themselves in a manner which is potentially unlawful. In every case where an employee has reasonable basis to

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[28] IBA-GAP Study, 13-16; ILO Study, 14-18; UNODC Guide, 22-26; Transparency International Principles.
[29] ibid.
[30] ibid
[31] IBA-GAP Study, 17-18; OCED Study; ILO Study, p. no. 14-15; Transparency International Principles, 4-5.
[32] ibid; See EU Whistleblower Protection Directive, art 4; See The Public Interest Disclosure Act 2013, s 10(b) (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 2, 4, 8, 10; See The Protected Disclosures Act 2000, s 19A (New Zealand).

believe they are being directed to act unlawfully, they must be: (*i*) vested with the right to refuse to follow that direction and (*ii*) be protected from adverse consequences for this refusal.[33] In some cases, an employee may need to consult a professional – such as a lawyer – for expert advice on the legality of the conduct in question. In such a case, the same protection should also be extended for the entirety of the time necessary to seek such advice.[34]

4. Ban on 'Gag Orders'

Any provision of law, or contract, that imposes a restraint on whistleblowing, or prescribes adverse consequences for whistleblowing, should be void.[35] This is relatively easy to ensure. The whistleblower law in question must have an overriding effect, and declare all provisions which act as 'gag orders' void.[36]

B. Best Practices in the Disclosure Stage

The disclosure stage, the stage in which the whistleblower actually 'blows the whistle' by disclosing information, is the most critical of the entire process. It is particularly important to design this stage with care, as the resulting framework can make, or break, a whistleblower mechanism. The best practices for designing the disclosure stage, in no particular order, are the following.

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[33] IBA-GAP Study, 16; Transparency International Principles, 6; See 5 USC § 2302(b)(9)(d).
[34] IBA-GAP Study, 17-18; OCED Study; ILO Study, p. no. 14-15; Transparency International Principles, 4-5; EU Whistleblower Protection Directive, art 4; See The Public Interest Disclosure Act 2013, s 10(b) (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 2, 4, 8, 10; See The Protected Disclosures Act 2000, s 19A (New Zealand).
[35] IBA-GAP Study, 21; UNODC Guide, 26; Transparency International Principles, 6.
[36] ibid; See EU Whistleblower Protection Directive, art. 21-22, 24; See The Public Interest Disclosure Act, 2013 (Act No. 133 of 2013), s. 10(1)(b), 10(2)(b) (Australia); See The Public Interest Information Disclosure (Provide Protection) Act, 2011 (Act No. 7 of 2011), s. 3 (Bangladesh).

1. Identity Protection

As explained above, the primary challenge of whistleblowing seems to be the real risk of retribution that follows. Protecting the identity of the whistleblower from disclosure significantly mitigates the probability of retribution. Absent this crucial information, it is difficult for the employer, and their associates, to identify the whistleblower and target them with adverse consequences. Identity protection for whistleblowers should therefore be a key element of any whistleblower mechanism.[37] In the absence of effective identity protection, there can be a serious chilling effect on whistleblowing. [38] Identity protection may be achieved in any of two ways: (*i*) anonymity, in which case the identity of the whistleblower is unknown to the government authority receiving the information; and (*ii*) confidentiality, in which case their identity is known to the government authority, but is protected from disclosure to the public at large by that authority.[39] Confidentiality must extend to not just the whistleblower's direct identity (such as their name, address, designation, etc.), but also to information which may indirectly identify them.[40] The authority must not disclose the whistleblower's identity without their consent. If the authority instead chooses to adopt a model where it may disclose identity without consent, it should have a clear policy, publicized well in advance, governing such non-consensual disclosures.[41]

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[37] IBA-GAP Study, 21; UNODC Guide, 26; Transparency International Principles, 6.
[38] ibid
[39] ibid; See EU Whistleblower Protection Directive, art 16; See The Public Interest Disclosure Act 2013, s 20-21, 24 (Australia); See The Public Interest Information Disclosure (Provide Protection) Act 2011, s 5 (Bangladesh); See The Republic of Lithuania Law on Protection of Whistleblowers, art 8-9; See18 USC § 1514A(b)(2).
[40] IBA-GAP Study, 21; UNODC Guide, 26; Transparency International Principles, 6.
[41] ibid.

2. Interim Relief

Interim relief is yet another means by which a whistleblower can be protected from retribution. In practice, a determination on the merits of a whistleblower retaliation claim may consume a significant amount of time. In the meanwhile, absent interim relief, the whistleblower will be left to fend for themselves, including by being subject to retaliation. Thus, the absence of interim relief practically allows the adverse consequences of retaliation to play out, which has a chilling effect on whistleblowing.[42] Hence, every whistleblower mechanism must allow for interim relief.[43] The mechanism should allow for a broad range of common law, and equitable, reliefs.[44] It seems that reinstatement of the employee in question to their original position prior to termination, with the same privileges and benefits they were drawing at the time of termination, is a particularly powerful interim relief because this incentivizes the employer to engage in 'damage control' by inducing them to settle on fair terms.[45]

C. Best Practices in the Post-Disclosure Stage

Finally, the ambit of a good whistleblower mechanism extends even after the whistleblower has made a disclosure. The best practices for designing the post-disclosure stage, in no particular order, are the following.

1. Rewards

Incentives are the most primal language all humans understand. Hence, everything else remaining constant, the promise of a potential monetary

[42] IBA-GAP Study, 28-29.
[43] ibid.
[44] ibid; See EU Whistleblower Protection Directive, art 21; See The Public Interest Disclosure Act 2013, s 15 (Australia); See The Public Interest Disclosure Act 1998, s 9 (UK); See 5 USC § 1214(b)(1), 1221(c).
[45] IBA-GAP Study, 29.

reward will stimulate more whistleblower disclosures. Hence, a whistleblower mechanism may allow for rewards to whistleblowers.[46] The quantum of the reward is typically linked to the monetary penalty recovered by the regulator in question on successful enforcement action. [47]

2. Broad Protection against Retaliation

Retaliation has a very significant chilling effect on whistleblowing. Hence, every whistleblower mechanism must protect a whistleblower against retaliation.[48] In defining the scope of retaliation, three key principles apply. *Firstly*, the forms of retaliation possible seem to be "limited only by the imagination".[49] Hence, a whistleblower mechanism needs to define retaliation broadly. Essentially, any form of discrimination or conduct – actual, threatened, or recommended attributable to the act of whistleblowing must be forbidden.[50] The consequences may not always be limited to the workplace and the employment relationship between whistleblower and employee. All forms of retaliation outside of the employment context such as civil actions, criminal actions, harassment of family members, etc. – should be prohibited. *Secondly*, it is important to recognize that retaliation may flow from not just the employer, but also third parties.[51] These third parties may not always be associated with the employer, or even in connivance with the employer. For example, a misplaced sense of loyalty to the organization may induce the whistleblower's co-workers to become hostile, without any inducement to that effect by the employer.[52] *Thirdly*, in the thirst to identify the whistleblower,

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[46] ILO Study, 21-22; UNODC Guide, 67-68; OECD Study, 22.
[47] IBA-GAP Study, 29.
[48] IBA-GAP Study, 19-20; ILO Study, 18-19; UNODC Guide, 45-46; OECD Study, 22.
[49] IBA-GAP Study, 29.
[50] ibid; See EU Whistleblower Protection Directive, art 5, 19, 21; See The Public Interest Disclosure Act 2013, s 10, 13, 23, 57, 58 (Australia); See The Public Interest Information Disclosure (Provide Protection) Act 2011, s 5 (Bangladesh).
[51] IBA-GAP Study, 29.
[52] ibid.

individuals may often identify the wrong person as the whistleblower, and subject that person to retaliation. Thus, all employees who are, or may be perceived as a whistleblower, or as aiding a whistleblower, must be protected from retaliation.[53] *Finally*, retaliation targeted against the family members of protected persons is almost as consequential as retaliation against the protected persons themselves. Hence, the scope of protection against retaliation must be extended to the immediate family members too.[54]

3. Reverse Burden of Proof for Retaliation Claims

Experience shows that it is extremely difficult for whistleblowers to prove retaliation when the entire burden of proof is placed on them.[55] The 'reverse' burden of proof, first adopted by the USA in its Whistleblower Protection Act, 1998, has now become the 'gold standard' across the world for whistleblower retaliation claims.[56] This standard makes it relatively easier for whistleblowers to prove retaliation claims.[57] Under this standard, (*i*) at the very outset, the whistleblower must make out a prima facie case of retaliation; and (*ii*) once they discharge this onus of proof, the onus shifts to the employer to prove, by "clear and convincing evidence" (an evidentiary standard higher than 'preponderance of probabilities but lower than 'beyond reasonable doubt'), that the conduct in question is not attributable to the whistleblower's

[53] IBA-GAP Study, 16-17; EU Whistleblower Protection Directive, art 4; See The Public Interest Disclosure Act 2013, s 13, 57 (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 10(3); See18 USC § 1514A.
[54] IBA-GAP Study, 17-18; EU Whistleblower Protection Directive, art 4; See The Public Interest Disclosure Act 2013, s 10(b) (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 2, 4, 8, 10.
[55] IBA-GAP Study, 25-27; UNODC Guide, 64-65.
[56] IBA-GAP Study, 17-18; EU Whistleblower Protection Directive, art 4; See The Public Interest Disclosure Act 2013, s 10(b) (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 2, 4, 8, 10.
[57] ibid.

disclosure.[58] Under the first limb of this standard, it is enough for the whistleblower to prima facie prove that the employee's whistleblowing was a 'contributing factor' for the conduct in question.[59]

4. True Compensatory Reliefs for Retaliation

Once retaliation is proved, the relief afforded to the whistleblower should be compensatory to the fullest extent possible.[60] The object is to restore the whistleblower to the status quo ante.[61] Hence, relief should extend to past, present, and future, consequences of the retaliation, including intangible consequences, such as emotional distress, loss of reputation, etc.[62] Notably, the whistleblower must be awarded real costs, to allow them to recoup the expenses incurred in the entire process of proving the retaliation claim.[63] Costs incurred in prosecuting a claim can quite often be very significant, and these must be compensated.

5. Capacity for Settlement of Retaliation Claims by ADR

Whistleblowers must be given the option to refer their retaliation claims to methods of alternative dispute resolution (ADR).[64] ADR

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[58] ibid; See EU Whistleblower Protection Directive, art 21; See 5 USC § 1214(b)(2)(4), 1221(e); See The Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina, art 8(3).
[59] ibid.
[60] IBA-GAP Study, 27-28; UNODC Guide, 47-48; OECD Study, 22; See EU Whistleblower Protection Directive, art 21; See The Public Interest Disclosure Act 2013, s 14, 16 (Australia); See The Protected Disclosures Act 2000, s 17 (New Zealand).
[61] EU Whistleblower Protection Directive, art 21; See 5 USC § 1214(b)(2)(4), 1221(e); See The Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina, art 8(3).
[62] ibid.
[63] IBA-GAP Study, 30-31; See EU Whistleblower Protection Directive, art 20; See The Public Interest Disclosure Act 2013, s 18 (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 8, 14; See The Protected Disclosures Act 2000, s 17 (New Zealand); See 5 USC § 1221(g).
[64] IBA-GAP Study, 25; See 5 USC § 7121.

mechanisms are often a viable, and less costly, a process by which a fair settlement can be reached in retaliation claims.[65]

6. Personal Accountability for Retaliation

In many cases, the employer that engages in retaliation will be a body corporate. Body corporates are abstract entities. They only act at the direction, and through the agency, of natural persons. The humans who direct the body corporate to retaliate or engage in retaliation on behalf of the body corporate, must be held individually liable.[66] This is necessary to ensure that humans are held responsible for their conduct, and for the deterrent effect of sanctions for retaliation to have its effect on them.[67]

III. THE INFORMANT MECHANISM UNDER THE SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015

A. Background

In India, statutory whistleblower mechanisms, that is, those established by a statute or according to a statutory direction are few and far between.

In principle, the need for a general whistleblower statute in India has been long recognized. A general law for the promotion of whistleblowing, and protection of whistleblowers against retaliation, was recommended as early as

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[65] IBA-GAP Study, 30-31; See EU Whistleblower Protection Directive, art 20; See The Public Interest Disclosure Act 2013, s 18 (Australia); See The Republic of Lithuania Law on Protection of Whistleblowers, art 8, 14; See The Protected Disclosures Act 2000, s 17 (New Zealand); See 5 USC § 1221(g).

[66] IBA-GAP Study, 31-32; UNODC Guide, 57-58; See EU Whistleblower Protection Directive, 23; See The Public Interest Disclosure Act 2013, s 14, 19 (Australia); See 18 USC § 1514A.

[67] IBA-GAP Study, 31-32.

2001, by the Law Commission in its 117th Report.[68] The Report includes a draft Bill for that purpose.[69] The 4th Report of the Second Administrative Reforms Commission, published in 2007, recognized the public value of whistleblowing and recommended the enactment of legislation to promote whistleblowing and protect whistleblowers from retaliation.[70] It noted that no law to that effect had yet been enacted.[71] Spurred by the controversy surrounding the murder of 'grand corruption' whistleblower Satyendra Dubey, and acting on the recommendations of the Law Commission, the Central Government introduced a whistleblower mechanism under the aegis of the Central Vigilance Commission (CVC). Notably, this was introduced through an executive resolution notified in the Gazette of India[72] and did not have and continues to lack any statutory basis. The scope of this mechanism is limited to disclosures concerning corruption by government servants, and employees of government-owned, or government-controlled, bodies[73] CVC continues to implement this mechanism based on that executive resolution, and in furtherance of additional executive circulars on the same subject.[74] The introduction of the Whistleblower Protection Bill, of 2011 was the first attempt at enacting a general whistleblowing statute.[75] After deliberation in committee

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[68] Law Commission of India, *117th Report on The Public Interest Disclosure and Protection of Informers* (Law Commission of India 2001).
[69] ibid.
[70] Second Administrative Reforms Commission, '*Fourth Report of Second Administrative Reforms Commission: Ethics in Governance'* (Government of India 2007), 77-79.
[71] ibid.
[72] Central Vigilance Commission, 'Notification No. No. 371/12/2002-AVD-111' (Gazette of India, 21 April 2004) <https://cvc.gov.in/sites/default/files/371_4_2013-AVD-III-16062014_0-7-13_1.pdf> accessed 18 March 2022.
[73] ibid.
[74] 'PIDPI Complaints | Guidelines for Lodging PIDPI Complaint', *Central Vigilance Commission* <https://cvc.gov.in/?q=citizens-corner/whistle-blower-complaints> accessed 27 October 2022.
[75] 'The Whistle Blowers Protection Bill, 2011', (*PRS Legislative Research)* <https://prsindia.org/billtrack/the-whistle-blowers-protection-bill-2011> accessed 27 October 2022.

and the Houses of Parliament, the Bill was passed as the Whistle Blowers Protection Act, 2014.[76] However, quite extraordinarily, despite the passage of 8 long years since, the Act has not yet been notified as law by the Central Government.[77] Thus, even today in 2022, India lacks a general statute on whistleblowing. In the meanwhile, parallel developments were unfolding in the limited arena of securities law. In 1999, SEBI appointed the K.M. Birla Committee on Corporate Governance to study the state of corporate governance in India and recommend changes to securities law to improve the governance of listed companies.[78] The committee's report recommended several changes, and thus changed the landscape of corporate governance in India forever. Many of the recommendations of the report such as the appointment of independent directors, raising an Audit Committee of the Board, and enhanced financial reporting standards[79] have since become the mainstay of the governance of listed companies today. SEBI enforced these recommendations through an exchange-driven regulatory mechanism. It directed stock exchanges to incorporate Clause 49 in the Listing Agreement, the agreement in a prescribed form, that every company desirous of listing must execute with the stock exchange[s] to incorporate the report's recommendations as obligations vested in listed companies.[80] In 2004, SEBI revamped the entire Clause 49 and directed the exchanges to enforce the

[76] The Whistle Blowers Protection Act 2014 (India).
[77] Gaurav Vivek Bhatnagar, 'Five Years After Passing Law to Protect Whistleblowers, Govt Yet to Operationalise It', (*The Wire*, 22 February 2019) <https://thewire.in/government/whistle-blowers-protection-act-five-years> accessed 27 October 2022.
[78] Kumar Mangalam Birla Committee on Corporate Governance, 'Report of the Committee Appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla' (SEBI 2000) para. 2.1-2.5
[79] ibid, para. 6.3-6.10, 9.1-9.10, 12.1.
[80] Securities and Exchange Board of India (SEBI), 'Circular No. SMDRP/POLICY/CIR-10/2000' (SEBI, 21 February 2000) <https://www.sebi.gov.in/legal/circulars/feb-2000/corporate-governance_17930.html> accessed 19 March 2022.

revised Clause 49.[81] The revised Clause 49 contained a skeletal prescription regarding an internal whistleblower mechanism in listed companies.[82] It recommended, but did not obligate, listed companies to establish an internal whistleblower mechanism, under the supervision of the Audit Committee of the Board of Directors.[83] The obligations under Clause 49 of the Listing Agreement were later given statutory form in the SEBI (LODR) Regulations, 2015.[84] Under the SEBI (LODR) Regulations, every listed company is now mandated to establish an internal whistleblowing mechanism known as the 'vigil mechanism', once again under the supervision of the Audit Committee of the Board.[85] The Companies Act, 2013 repeats the same requirement.[86] These Regulations too are not very prescriptive regarding the vigil mechanism, and this confers on the Board a significant degree of discretion in designing the mechanism.[87] SEBI's intent of establishing an external whistleblower mechanism by which disclosures can be made directly to SEBI was revealed in concrete form for the first time in 2019. SEBI released a discussion paper on the proposed mechanism and called for public comments on the proposal.[88] By an amendment [89] to the Regulations later that year, SEBI

[81]Securities and Exchange Board of India (SEBI), 'Circular No. SEBI/CFD/DIL/CG/1/2004/12/10' (SEBI, 29 October 2004) <https://www.sebi.gov.in/legal/circulars/oct-2004/corporate-governance-in-listed-companies-clause-49-of-the-listing-agreement_13153.html> accessed 19 March 2022.
[82] ibid Annexure I, para. D(12); Annexure I C, para. 7(iii); ibid, Annexure I D, para. 7.
[83] ibid.
[84] The Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015.
[85] ibid, reg 4(2)(d)(iv), 22, 46(2)(e).
[86] The Companies Act 2013, s 177(9), 177(10) (India).
[87] ibid.
[88] Securities and Exchange Board of India (SEBI), 'Discussion Paper on amendment to the SEBI (Prohibition of Insider Trading) Regulations, 2015 to provision for an informant mechanism' (SEBI, 2019) <https://www.sebi.gov.in/reports/reports/jun-2019/discussion-paper-on-amendment-to-the-sebi-prohibition-of-insider-trading-regulations-2015-to-provision-for-an-informant-mechanism_43237.html> accessed 27 October 2022.
[89] The Securities and Exchange Board of India (Prohibition of Insider Trading) (Third Amendment) Regulations 2019.

inserted a new Chapter III-A. The chapter established an informant mechanism for whistleblowers to report information concerning insider trading to SEBI.[90] It contains a reporting mechanism, provisions concerning the protection of the informant's identity, and rewards for the informant. [91] The scope of this mechanism is limited to disclosures concerning insider trading alone.[92] There is presently no similar mechanism for the disclosure of any other wrongs under securities law to SEBI. In this part, the author has deconstructed the key provisions of the informant mechanism under the Regulations and critically analyzed each of them, using the global best practices for designing a whistleblower mechanism as the yardstick.

B. Gag Orders and Right to Refuse

The Regulations explicitly declare as void any contractual provision that prevents any person other than an advocate from disclosing the informant mechanism.[93] This is entirely consistent with the global best practice of preventing 'gag orders'.[94] Global best practice also requires the law to confer on every employee a right to refuse to act in a manner reasonably believed to be unlawful until a legal determination is obtained.[95] The Regulations, however, are entirely silent on such a right. To that extent, the Regulations are not consistent with global best practices.

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[90] ibid.
[91] ibid.
[92] ibid.
[93] SEBI (PIT) Regulations, reg 7J.
[94] IBA-GAP Study, 21; UNODC Guide, 26; Transparency International Principles, 6; See EU Whistleblower Protection Directive, art 21-22, 24; See The Public Interest Disclosure Act 2013, s 10(1)(b), 10(2)(b) (Australia); See The Public Interest Information Disclosure (Provide Protection) Act 2011, s 3 (Bangladesh).
[95] IBA-GAP Study, 16; Transparency International Principles, 6; See 5 USC § 2302(b)(9)(d).

C. Definition of 'informant'

Under the Regulations, the whistleblower has been termed as an "informant". Unfortunately, the informant mechanism under the Regulations seems doomed from the very beginning due to the unsound definition of the term "informant". The definition is not consistent with global best practices on defining a whistleblower and the scope of protected disclosures, as it imposes an onerous burden of proof on the informant.

The Regulations define "informant" as an individual who discloses information concerning a violation of insider trading that: (*a*) has occurred; (*b*) is occurring; or (*c*) the informant has a reasonable belief is about to occur. [96] Note that the reasonable belief qualifier applies only to the third limb of the definition, to the exclusion of the first two limbs. Thus, to be considered an informant under the Regulations, a whistleblower disclosing past or present, the conduct must provide information concerning an actual violation of insider trading laws. This places a burden on the informant to satisfy themselves that the information disclosed relates to conduct that is an actual violation of insider trading laws. This burden is unduly onerous because of two reasons. *Firstly*, the informant has to satisfy themselves with a legal question, which they are not qualified to do. They must therefore seek counsel from a professional, and thus incur costs in the process. *Secondly*, and more importantly, a determination by a professional is hardly conclusive. SEBI is the final arbiter of questions of violation. It is very much possible for SEBI, and the professional in question, to arrive at different conclusions, even when both are acting reasonably and in good faith. This introduces a significant element of unpredictability in the informant mechanism. The increased costs, and unpredictability, that result is likely to deter some whistleblowers from

[96] SEBI (PIT) Regulations, reg 7A(b).

reporting useful information. The burden placed on whistleblowers under this mechanism is inconsistent with the global best practice, which is to require the whistleblower to merely demonstrate a reasonable belief that the information disclosed pertains to a violation.[97]

D. Informant Identity Protection

On the upside, the Regulations adopt a 'layered' framework for protecting the identity of the informant. When the informant discloses the informant mechanism, they have two options: (*i*) file the disclosure individually; or (*ii*) file it through a "legal representative" entitled to practice law in India, that is an advocate.[98] If filed individually, the informant must disclose their identity.[99] Filing the disclosure through an advocate adds a layer of quasi-anonymity, which can be pierced only by SEBI.[100] The advocate must verify the identity of the informant before filing but must not disclose it to SEBI unless specifically directed to by SEBI. [101] This allows the informant to choose a trusted advocate as a 'gatekeeper' for their identity. However, the identity protection framework suffers from two serious limitations: (*i*) there is inadequate guidance in the Regulations on how SEBI will treat identifying information in the disclosure form; and (*ii*) the framework on confidentiality, and non-consensual disclosures, is not sufficiently precise to inspire confidence in, and promote, whistleblowing. To the extent possible, the informant is allowed to expunge identifying information in the disclosure form.[102] To the extent not possible, they are allowed to specifically indicate

[97] IBA-GAP Study, 13-16; ILO Study, 14-18; UNODC Guide, 22-26; Transparency International Principles, 4-5.
[98] SEBI (PIT) Regulations, reg 7B(1).
[99] ibid; Schedule D.
[100] ibid; ibid, reg 7B.
[101] ibid.
[102] ibid, reg. 7B(C).

the particular information in the form that is identifying.[103] This presumably is an indicator for SEBI to treat that part of the disclosure with additional care, although there is technically no obligation on SEBI to do so. Absent a clear indication in the Regulations of the utility of marking identifying information as such, this provision does not seem to be of much guidance to a whistleblower. In every case, as a general rule, disclosures under the informant mechanism are held in confidence.[104] However, there are broad, discretionary exceptions to this obligation, such as when the information is required to be disclosed in a legal proceeding in furtherance of the Board's legal position, or when disclosure is otherwise required or permitted by law.[105] SEBI also has a broad discretionary power to disclose the information to any regulator, self-regulatory organization, stock exchange, clearing houses, law enforcement organizations, or public prosecutors.[106] Global best practice recognizes that: (*a*) ideally, confidentiality must not be pierced without the consent of the informant; and (*b*) if non-consensual disclosure is allowed under the law at all, there must be a clear policy, publicized well in advance, to guide such disclosures.[107] The Regulations fail to provide adequate guidance regarding the policy of SEBI on non-consensual disclosures. Broad discretionary powers, such as those vested in SEBI under the informant mechanism, hardly satisfy that standard. This almost certainly has a very serious chilling effect on whistleblowing, as whistleblowers do not know, with sufficient precision, the extent to which their identity will be protected.

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[103] ibid.
[104] ibid, reg. 7H(3).
[105] ibid, reg. 7H(1).
[106] ibid, reg. 7H(2).
[107] IBA-GAP Study, 21; UNODC Guide, 26; Transparency International Principles, 6.; See EU Whistleblower Protection Directive, art 16; See The Public Interest Disclosure Act 2013, s 20-21, 24 (Australia); See The Public Interest Information Disclosure (Provide Protection) Act 2011, s 5 (Bangladesh); See The Republic of Lithuania Law on Protection of Whistleblowers, art 8-9; See18 USC § 1514A(b)(2).

E. Protection Against Retaliation

The Regulations contain several provisions to protect whistleblowers from retaliation. However, these provisions fall short of global best practice on four grounds: (*i*) the scope of protected persons does not extend to 'insiders' outside of an employment relationship; (*ii*) the causal link a whistleblower must demonstrate between their whistleblowing and the discrimination by the employer is onerous; (*iii*) most critically, there seems to be no real remedy against retaliation; and (*iv*) finally, the Regulations does not apply the 'reverse' burden of proof that is considered the gold standard in retaliation claims.

The scope of protected persons – that is, persons who are protected from retaliation for disclosing the informant mechanism – is broader than the scope of an informant. Given the unsatisfactorily narrow definition of an insider, the relatively broader definition is a saving grace to a large extent. Nevertheless, the definition is not broad enough. Under the Regulations, a protected person is: (*a*) any employee, (*b*) of a listed company or an intermediary, (*c*) who discloses the informant mechanism. [108] The definition of an employee restricts its scope to: (*a*) directors, partners, regular employees, and contractual employees, and (*b*) a person who is an employment relationship with the listed company, or the intermediary, in question.[109] The global best practice is to extend the protection against retaliation to, every 'insider' who is likely to be privy to inside information concerning a wrong (including persons outside of employment relationships, such as probationers,

[108] SEBI (PIT) Regulations, reg 7I(1); ibid, reg. 9(1).
[109] ibid, reg 71(1), Explanation.

interns, consultants, etc), and their family members. [110] The definition under the Regulations fails to protect 'insiders' outside the employment relationship, and the family members of 'insiders'. To that extent, the definition falls short of global best practice.

Retaliation, under the Regulations, is defined broadly. It extends specifically to all direct, and indirect, "discharge, termination, demotion, suspension, threats, harassment".[111] More importantly, the scope of retaliation is left open-ended, to include any form of "discrimination".[112] To this extent, the definition is consistent with the global best practice of defining retaliation in an open-ended manner, since the forms of retaliation possible are limited only by the imagination. [113] However, the definition seems to fall short in its definition of the causal link required between the disclosures of the informant and the conduct of the employer. Discrimination against an employee is retaliation only if it is "because of": (*a*) making a disclosure under the informant mechanism; (*b*) aiding SEBI in a proceeding; or (*c*) breaching a term of employment that prevents the employee from cooperating with SEBI. [114] The expression "because of" seems to suggest that the three listed events must be the only, or at least the primary cause or the dominant cause, for the discrimination in question. This is not consistent with global best practice, which is to require the whistleblower's conduct to merely be a contributing

[110] IBA-GAP Study, 19-20; ILO Study, 18-19; UNODC Guide, 45-46; OECD Study, 22; See EU Whistleblower Protection Directive, art 5, 19, 21; See The Public Interest Disclosure Act 2013, s 10, 13, 23, 57, 58 (Australia); See The Public Interest Information Disclosure (Provide Protection) Act 2011, s 5 (Bangladesh).
[111] SEBI (PIT) Regulations, reg 7I(1).
[112] ibid.
[113] IBA-GAP Study, 19-20; ILO Study, 18-19; UNODC Guide, 45-46; OECD Study, 22; See EU Whistleblower Protection Directive, art 5, 19, 21; See The Public Interest Disclosure Act 2013, s 10, 13, 23, 57, 58 (Australia); See The Public Interest Information Disclosure (Provide Protection) Act 2011, s 5 (Bangladesh).
[114] SEBI (PIT) Regulations, reg 7I(1).

factor (that is, a relevant cause, but not necessarily the primary cause or the dominant cause) for the discrimination.[115] A 'primary/dominant' factor, or a 'sole factor', the test is inappropriate because it is an unduly onerous, and impractical, standard for the whistleblower to satisfy in a retaliation claim. [116]

On paper, there is a remedy under the Regulations for retaliation. A listed company, or intermediary, that engages in retaliation against an employee is liable to enforcement action by SEBI under securities law.[117] However, on closer analysis, this remedy seems entirely farcical for two reasons. *Firstly*, this most critical provision is torpedoed by the fact that these particular provisions seem to be ultra vires the SEBI Act. The Regulations, as subordinate legislation, must be enacted within the quasi-legislative competence of SEBI under the SEBI Act.[118] SEBI is empowered to enact Regulations to "carry out the purposes of [the] Act", but the Regulations so enacted must not be inconsistent with the Act or the rules made under it.[119] The purpose of the Act is limited to: (*a*) protecting the interests of securities investors; and (*b*) regulating, and promoting the development of, the securities market.[120] Whistleblowing per se provides valuable information to SEBI, relying on which it can commence enforcement actions to protect the integrity of the securities market. However, enforcing remedies against retaliation does not have such a direct link to the regulation of the securities market. Hence, the causal link between SEBI providing and enforcing, remedies for retaliation by listed companies, and intermediaries, against informants, appears quite

[115] IBA-GAP Study, 25-27; UNODC Guide, 64-65; See EU Whistleblower Protection Directive, art 21; See 5 USC § 1214(b)(2)(4), 1221(e); See The Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina, art 8(3).
[116] ibid.
[117] SEBI (PIT) Regulations, reg 7I(3).
[118] *Shri Sitaram Sugar Co Ltd v Union of India* AIR 1990 SC 1277 (India); *Municipal Corporation of Greater Bombay v Nagpal Printing Mills* AIR 1988 SC 1009 (India).
[119] The Securities and Exchange Board of India Act 1992, s 30.
[120] ibid, Preamble.

tenuous. The provision in question thus seems to have no nexus with the purposes of the Act. It, therefore, appears to be ultra vires the parent statute, and thus void. *Secondly*, even otherwise, the employee seems to lack an effective remedy for retaliation. Under the Regulations, the employee has the right to seek relief from retaliation under other laws.[121] At present, there is no other law that provides an equally effective remedy against retaliation. Theoretically, the employee can claim that the right against retaliation is a statutory right arising out of the Regulations, enforceable by a civil suit. As a general rule, bare rights, and obligations, arising out of a statute are civil.[122] However, even in such a case, the SEBI Act would explicitly prevent the employee from bringing a civil suit to enforce that right, as the Act ousts the jurisdiction of civil courts.[123] As the adage goes, a right without a remedy is not worth the paper it is written on.

Finally, the Regulations are completely silent on the burden of proof in a retaliation claim. This is conspicuously inconsistent with the global best practice, which is to apply a 'reverse' burden of proof in such cases.[124]

F. Rewards Mechanism

The Regulations establish a rewards mechanism under the informant mechanism. An informant who supplies original information that leads to a successful enforcement action is eligible for a reward. The Board, at its sole discretion, can declare a reward up to 10% of the disgorgement amount levied by SEBI on the wrongdoer in that enforcement action, subject to a cap of ₹ 10

[121] SEBI (PIT) Regulations, reg 7I(2), 7I(4).
[122] *SEBI v Cabot International* (2005) 123 Comp Cas 841 (Bom) (India).
[123] The Securities and Exchange Board of India Act 1992, s 15Y.
[124] IBA-GAP Study, 25-27; UNODC Guide, 64-65; See EU Whistleblower Protection Directive, art 21; See 5 USC § 1214(b)(2)(4), 1221(e); See The Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina, art 8(3).

crores.[125] The rewards mechanism seems to be consistent with the global best practice, which is to allow discretionary rewards to the whistleblower proportionate to the penalties recovered by the government in an enforcement action initiated based on their disclosure.[126]

IV. CONCLUSION

With the informant mechanism, SEBI's heart appears to be in the right place. Its discussion paper issued before the enactment of the informant mechanism broadly reflects a sound understanding of the relevance of an effective whistleblower mechanism to a securities market regulator, and its fundamental features.[127] However, it seems this intent has failed to entirely translate to regulation. Consequently, the resulting informant mechanism suffers from several lacunae which seriously call into question its effectiveness. On these points, the informant mechanism deviates from global best practices in designing effective whistleblowing mechanisms. Thus, my hypothesis that the informant mechanism is not consistent with global best practices seems to be true.

To conclude, I summarize the points on which the informant mechanism deviates from global best practice and present my recommendation for addressing those lacunae by aligning it with global best practice through an amendment to the Regulations:

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[125] SEBI (PIT) Regulations, reg 7D(1), 7E(1).
[126] ILO Study, 21-22; UNODC Guide, 67-68; OECD Study, 22.
[127] Securities and Exchange Board of India (SEBI), 'Discussion Paper on amendment to the SEBI (Prohibition of Insider Trading) Regulations, 2015 to provision for an informant mechanism' (SEBI 2019) <https://www.sebi.gov.in/reports/reports/jun-2019/discussion-paper-on-amendment-to-the-sebi-prohibition-of-insider-trading-regulations-2015-to-provision-for-an-informant-mechanism_43237.html> accessed 27 Octobeer 2022, 1-11.

Drawback	Recommendation
There is no right vested in an employee to refuse to follow a direction from a superior they reasonably believe is unlawful until they can obtain a legal determination on its lawfulness.	Vest every employee of listed companies, intermediaries, and other market participants SEBI has the power to regulate, with this right in the workplace.
The scope of a protected disclosure is limited to information concerning the violation of insider trading laws that: (*a*) "has occurred"; (*b*) "is occurring"; or (*c*) the informant has a "reasonable belief… is about to occur".	Broaden the definition to protect the disclosure of all information that the informant reasonably believes to be concerning a past, continuing, or future, violation of insider trading laws.
There is inadequate guidance in the Regulations on how SEBI will treat information marked as identifying in the disclosure form.	Explicitly clarify, with sufficient precision, how SEBI will treat identifying information differently from non-identifying information.
There are broad, discretionary exceptions to the general obligation of SEBI to keep the informant's identity in confidence.	It may not be feasible to entirely discard exceptions to the general obligation of confidence or to vest no discretion in SEBI in that regard. Thus, a better approach would be to: (*i*) reduce the number of exceptions to the minimum strictly necessary,

	and (*ii*) provide sufficiently precise guidance in the Regulations to ensure the scope of the exceptions is reasonably clear to an informant.
The scope of persons protected against retaliation does not extend to: (*a*) 'insiders' outside of an employment relationship; and (*b*) the family members of 'insiders'.	Extend the scope of protected persons to: (*a*) every person who is likely to be privy to inside information concerning a wrong— including persons outside of employment relationships, such as probationers, interns, consultants, etc.; and (*ii*) their family members.
To claim relief against retaliation, the employer must prove that their whistleblowing is the primary, or dominant, cause for the employer's discrimination against them.	The employee should be required to prove merely that their whistleblowing was a "contributing factor" (that is, a relevant cause, but not necessarily the primary cause or the dominant cause) for the discrimination by their employer.
There seems to be no real remedy against retaliation, as the provision concerning anti-relation remedies seems to be outside the quasi-legislative competence of SEBI.	Insert a specific provision in the SEBI Act that allows SEBI to prescribe, and enforce, anti-relation remedies for whistleblowers who make disclosures under the informant mechanism.

The burden of proving retaliation lies entirely on the employee, to a preponderance of probabilities.	Apply the 'reverse' burden of proof that is globally recognized as the gold standard in retaliation claims.