

File No. 180317

Committee Item No. 7

Board Item No. \_\_\_\_\_

# COMMITTEE/BOARD OF SUPERVISORS

## AGENDA PACKET CONTENTS LIST

Committee: Rules Committee

Date November 28, 2018

Board of Supervisors Meeting

Date \_\_\_\_\_

### Cmte Board

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| <input type="checkbox"/>            | <input type="checkbox"/> | Motion                                       |
| <input type="checkbox"/>            | <input type="checkbox"/> | Resolution                                   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Ordinance                                    |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Legislative Digest                           |
| <input type="checkbox"/>            | <input type="checkbox"/> | Budget and Legislative Analyst Report        |
| <input type="checkbox"/>            | <input type="checkbox"/> | Youth Commission Report                      |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Introduction Form                            |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Department/Agency Cover Letter and/or Report |
| <input type="checkbox"/>            | <input type="checkbox"/> | Memorandum of Understanding (MOU)            |
| <input type="checkbox"/>            | <input type="checkbox"/> | Grant Information Form                       |
| <input type="checkbox"/>            | <input type="checkbox"/> | Grant Budget                                 |
| <input type="checkbox"/>            | <input type="checkbox"/> | Subcontract Budget                           |
| <input type="checkbox"/>            | <input type="checkbox"/> | Contract/Agreement                           |
| <input type="checkbox"/>            | <input type="checkbox"/> | Form 126 - Ethics Commission                 |
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| <input type="checkbox"/>            | <input type="checkbox"/> | Application                                  |
| <input type="checkbox"/>            | <input type="checkbox"/> | Form 700                                     |
| <input type="checkbox"/>            | <input type="checkbox"/> | Vacancy Notice                               |
| <input type="checkbox"/>            | <input type="checkbox"/> | Information Sheet                            |
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OTHER (Use back side if additional space is needed)

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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <u>CEQA Determination</u> |
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Completed by: Victor Young Date Nov. 21, 2018

Completed by: \_\_\_\_\_ Date \_\_\_\_\_

1 [Campaign and Governmental Conduct Code - Expanding Whistleblower Protections]

2  
3 **Ordinance amending the Campaign and Governmental Conduct Code to provide**  
4 **additional retaliation protections for whistleblowers, establish retaliation protections**  
5 **for City contractors, increase the remedies available for whistleblowers who have**  
6 **suffered retaliation, and establish greater confidentiality protections for**  
7 **whistleblowers' identities.**

8 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
9 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
10 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
11 **Board amendment additions** are in double-underlined Arial font.  
12 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
13 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
14 subsections or parts of tables.

15 Be it ordained by the People of the City and County of San Francisco:

16 Section 1. The Campaign and Governmental Conduct Code is hereby amended by  
17 revising Sections 4.100, 4.105, 4.107, 4.110, 4.115, and 4.120, and adding a new Section  
18 4.117, to read as follows:

19 **SEC. 4.100. FINDINGS.**

20 The City and County of San Francisco ("City") has a paramount interest in protecting  
21 the integrity of its government institutions. To further this interest, individuals should be  
22 encouraged to report ~~to the City's Ethics Commission, Controller, District Attorney, City Attorney~~  
23 ~~and the complainant's department~~ possible violations of laws, regulations, and rules governing  
24 the conduct of City officers and employees, City contractors, and employees of City contractors.

25 This Chapter 1 fulfills the Charter's requirements for two City programs relating to  
whistleblowers, as required by Charter Appendix Section F1.107. First, as required by the Charter, the  
Office of the Controller has authority to receive and investigate whistleblower complaints concerning

1 deficiencies in the quality and delivery of City government services, wasteful and inefficient City  
2 government practices, misuse of City funds, and improper activities by City officers, employees, and  
3 contractors.

4 Second, as required by the Charter, this ordinance protects the confidentiality of  
5 whistleblowers, and protects City officers and employees from retaliation for filing whistleblower  
6 complaints or providing assistance with the investigation of such complaints. As set forth in this  
7 Chapter 1, the Ethics Commission has primary responsibility for ensuring such protections.

8 ~~This Chapter protects all City officers and employees from retaliation for filing a complaint~~  
9 ~~with, or providing information to, the Ethics Commission, Controller, District Attorney, City Attorney~~  
10 ~~or complainant's department about improper government activity by City officers and employees.~~

11 ~~This Chapter ensures that complaints that do not allege a violation of law over which the Ethics~~  
12 ~~Commission or Controller has jurisdiction are directed to the appropriate agency for investigation and~~  
13 ~~possible disciplinary or enforcement action.~~

14 ~~Finally, this Chapter implements Charter Appendix Section F1.107. Section F1.107 directs the~~  
15 ~~Controller, as City Services Auditor, to administer a whistleblower program and investigate reports of~~  
16 ~~complaints concerning the misuse of City funds, improper activities by City officers and employees,~~  
17 ~~deficiencies in the quality and delivery of government services, and wasteful and inefficient City~~  
18 ~~government practices.~~

19 **SEC. 4.105. COMPLAINTS OF IMPROPER GOVERNMENT ACTIVITY;**  
20 **INVESTIGATION PROCEDURES; REFERRAL TO OTHER AGENCIES.**

21 (a) COMPLAINTS. Any person may file a complaint for investigation with the Office of  
22 the Controller's Whistleblower Program, Ethics Commission, ~~Controller,~~ District Attorney, ~~or~~ City  
23 Attorney, or ~~a written complaint with~~ the complainant's department alleging that a City officer or  
24 employee has engaged in improper government activity, misused City funds, caused deficiencies  
25 in the quality and delivery of government services or engaged in wasteful and inefficient government

1 practices, or that a City contractor or employee of a City contractor has engaged in unlawful activity in  
2 connection with a City contract. by: violating local campaign finance, lobbying, conflicts of interest or  
3 governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City  
4 resources; creating a specified and substantial danger to public health or safety by failing to perform  
5 duties required by the officer or employee's City position; or abusing his or her City position to  
6 advance a private interest.

7 (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission  
8 shall investigate complaints filed under this Section 4.105 that allege contain potential violations  
9 of local campaign finance, lobbying, conflicts of interest, and governmental ethics laws  
10 pursuant to the procedures specified in Charter Section C3.699-13 and the regulations  
11 adopted thereunder. Nothing in this subsection (b) shall preclude the Ethics Commission from  
12 referring any matter to any other City department, commission, board, officer, or employee or  
13 to other government agencies for investigation and possible disciplinary or enforcement  
14 action. The Ethics Commission may require that any City department, commission, board,  
15 officer, or employee report to the Ethics Commission on the referred matter.

16 (c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a  
17 violation of law, regulation or rule that is within the Ethics Commission's jurisdiction to the  
18 appropriate agency for investigation and possible disciplinary or enforcement action. The  
19 Commission may conduct preliminary investigations into such complaints to determine  
20 whether the complaint contains sufficient information to warrant referral. The Ethics  
21 Commission may require that any City department, commission, board, officer or employee to  
22 provide a written report regarding the department's investigation and any action that the department  
23 has taken in response to the Ethics Commission's referral within a time-frame that the Ethics  
24 Commission shall specify. report to the Ethics Commission on the referred matter.

1           **SEC. 4.107. COMPLAINTS BY CITIZENS AND EMPLOYEES; WHISTLEBLOWER**  
2 **PROGRAM.**

3           (a) WHISTLEBLOWER PROGRAM. The Controller shall administer and publicize a  
4 whistleblower and citizen complaint program for citizens and employees to report the misuse  
5 of City funds, improper *government* activities by City officers and employees, deficiencies in the  
6 quality and delivery of government services, and wasteful and inefficient City government  
7 practices. *Subject to subsection (b),* ~~The~~ Controller shall investigate and otherwise attempt to  
8 resolve complaints reported to the Whistleblower Program. The Controller shall administer a  
9 hotline telephone number and website and publicize the hotline and website through press  
10 releases, public advertising, and communications to City employees.

11           (b) REFERRAL OF CERTAIN COMPLAINTS. The Controller shall refer the following  
12 complaints as set forth in this *subSection (b)*:

13           ~~(i)~~ (1) Those which another City agency is required by federal, state, or local law  
14 to adjudicate: To that agency;

15           ~~(ii)~~ (2) Those which may be resolved through a grievance mechanism  
16 established by collective bargaining agreement or contract: To the official or agency  
17 designated in the agreement or contract;

18           ~~(iii)~~ (3) Those which involve allegations of conduct which may constitute a  
19 violation of criminal law: To the District Attorney or other appropriate law enforcement  
20 agency;

21           ~~(iv)~~ (4) Those which are subject to an existing, ongoing investigation by the  
22 District Attorney, City Attorney, or Ethics Commission, where the applicable official or  
23 Commission states in writing that investigation by the Controller would substantially impede or  
24 delay his, her, or its own investigation of the matter: To the investigating office; and  
25

1           (4) (5) Those which allege conduct that may constitute a violation of local  
2 campaign finance, lobbying, conflict of interest, or governmental ethics laws, regulations, or rules:  
3 To the Ethics Commission and the City Attorney.

4           Where the conduct that is the subject of the complaint may violate criminal law  
5 and any civil or administrative law, statute, ordinance, or regulation, the Controller may take  
6 action on the noncriminal aspects of the matter under this Section 4.107 even if a referral has  
7 been made to another agency under this subSection (b).

8           If a complaint is referred under this subSection (b), the Controller shall inform  
9 the complainant of the appropriate procedure for the resolution of the complaint.

10          (c) TRACKING AND INVESTIGATION. The Controller shall receive, track, and  
11 investigate complaints made or referred to the Whistleblower Program. The investigation may  
12 include all steps that the Controller deems appropriate, including the review of the complaint  
13 and any documentary or other evidence provided with it, the gathering of any other relevant  
14 documents from any City department or other source, and interviews of the complainant and  
15 other persons with relevant information.

16          (d) INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances  
17 in which the Controller deems it appropriate, the Controller may require that persons making  
18 complaints or providing information swear to the truth of their statements by taking an oath  
19 administered by the Controller, or an agent of the Controller, or through written declarations  
20 made under penalty of perjury under the laws of the State of California.

21          (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may  
22 refer the complaint to a City department for investigation, either before conducting an initial  
23 investigation or after doing so, and may recommend that a City department take specific  
24 action based on the Controller's initial investigation. Within 60 days of receiving a complaint  
25 for investigation or a recommendation by the Controller for specific action, or such other time

1 as the Controller shall specify, the City department shall report to the Controller in writing the  
2 results of the department's investigation and any action that the department has taken in  
3 response to a recommendation by the Controller that the department take specific action.

4 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the  
5 Controller has recommended that a City department take disciplinary or other corrective  
6 action that the department has declined to take, the department shall report to the Controller  
7 its reasons for failing to do so within the ~~timeframe~~ time frame that the Controller specifies for  
8 reporting on its investigation of the complaint. If the Controller determines that the  
9 department's reasons are inadequate and that further investigation may be appropriate, the  
10 Controller may refer the matter to the Mayor, City Attorney, or District Attorney, or to any  
11 officer or agency that has jurisdiction over the matter.

12 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be  
13 responsible for compliance by his or her department with these duties. If department staff fail  
14 to comply with the duties to investigate complaints referred by the Controller and to make the  
15 reports required by this Section 4.107, the Controller shall notify the department head. If the  
16 department head fails to take action to obtain the department's compliance with these duties,  
17 the Controller may refer the matter to the Mayor, City Attorney, or District Attorney, or to any  
18 officer or agency that has jurisdiction over the matter.

19 **SEC. 4.110. DEFINITIONS.**

20 For purposes of this Chapter I, the following words and phrases shall have the  
21 following meanings:

22 ~~(a) The term~~ "City" or "City agency" shall mean the City and County of San Francisco,  
23 its departments, commissions, task forces, committees, and boards.

1           ~~(b) The term "e~~Complainant's department" includes the complainant's supervisor; the  
2 executive director or highest ranking officer in the complainant's department, and the board or  
3 commission overseeing the complainant's department.

4           "Deficiencies in the quality and delivery of government services" shall mean the failure to  
5 perform a service, when performance is required under any law, regulation or policy, or under a City  
6 contract or grant.

7           "Improper government activity" shall mean violation of any federal, state, or local law,  
8 regulation, or rule, including but not limited to laws, regulations, or rules governing campaign finance,  
9 conflicts of interest, or governmental ethics laws; or action which creates a danger to public health or  
10 safety by the failure of City officers or employees to perform duties required by their positions.

11           "Improper government activity" does not include employment actions for which other remedies exist.

12           "Misuse of City funds" shall mean any use of City funds for purposes outside of those directed  
13 by the City.

14           ~~(e) The term "p~~Preliminary investigation" shall be limited to, but need not include all of,  
15 the following: review of the complaint and any documentary evidence provided with the  
16 complaint; interview of the complainant; interview of the respondent, counsel to respondent  
17 and any witnesses who voluntarily agree to be interviewed for this purpose; review of any  
18 relevant public documents and documents provided voluntarily to the Commission.

19           "Supervisor" shall mean any individual having the authority, on behalf of the City, to hire,  
20 transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or the  
21 responsibility to routinely direct them, to adjust their grievances, or to effectively recommend such  
22 action, if, in connection with the foregoing, the exercise of that authority is not merely routine or  
23 clerical, but requires the use of independent judgment.

24           "Unlawful activity" shall mean violations of any federal, state or local law, regulation or rule  
25 including but not limited to those laws, regulations or rules governing campaign finance, conflicts of

1 interest or governmental ethics laws; or actions which create a danger to public health or safety by the  
2 failure of City officers or employees to perform duties imposed by a City contract.

3 "Wasteful and inefficient City government practices" shall mean the expenditure of City funds  
4 that could be eliminated without harming public health or safety, or reducing the quality of government  
5 services.

6 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS - CITY EMPLOYEES.**

7 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote,  
8 suspend, or take other similar adverse employment action against any City officer or  
9 employee because the officer or employee has in good faith:

10 (i) (1) filed a complaint as set forth in Section 4.105(a); with the Ethics Commission,  
11 Controller, District Attorney or City Attorney, or a written complaint with the complainant's  
12 department, alleging that a City officer or employee engaged in improper government activity by:  
13 violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws;  
14 regulations or rules; violating the California Penal Code by misusing City resources; creating a  
15 specified and substantial danger to public health or safety by failing to perform duties required by the  
16 officer or employee's City position; or abusing his or her City position to advance a private interest, (ii)  
17 filed a complaint with the Controller's Whistleblower Program, or

18 (2) attempted to file a complaint through the procedures set forth in Section 4.105(a)  
19 but, in good faith, did not file the complaint with the appropriate City department or official; or

20 (iii) (3) provided any information in connection with or otherwise cooperated with  
21 any investigation conducted under this Chapter 1.

22 (b) COMPLAINTS OF RETALIATION ~~FOR HAVING FILED A COMPLAINT ALLEGING~~  
23 ~~IMPROPER GOVERNMENT ACTIVITY.~~

24 (i) (1) Administrative Complaints. Any ~~city~~ City officer or employee, or former  
25 ~~city~~ City officer or employee, who believes he or she has been the subject of retaliation in

1 violation of ~~S~~subsection (a) of this Section 4.115 may file a complaint with the Ethics  
2 Commission. The complaint must be filed no later than two years after the date of the alleged  
3 retaliation.

4 The Ethics Commission shall investigate complaints of violations of ~~S~~subsection  
5 (a) of this Section 4.115 pursuant to the procedures specified in ~~San Francisco~~ Charter Section  
6 C3.699-13 and the regulations adopted thereunder. The Ethics Commission may decline to  
7 investigate complaints alleging violations of ~~S~~subsection (a) if it determines that the same or  
8 similar allegations are pending with or have been finally resolved by another administrative or  
9 judicial body. Nothing in this ~~S~~subsection (b)(1) shall preclude the Ethics Commission from  
10 referring any matter to any other City department, commission, board, officer, or employee, or  
11 to other government agencies for investigation and possible disciplinary or enforcement  
12 action. The Ethics Commission may refer matters to the Department of Human Resources  
13 with a recommendation. The Ethics Commission may require ~~that~~ any City department,  
14 ~~commission, board, officer or employee~~ to provide a written report regarding the department's  
15 investigation and any action that the department has taken in response to the Ethics Commission's  
16 referral within a time frame that the Ethics Commission shall specify. ~~report to the Ethics Commission~~  
17 ~~on the referred matter.~~

18 ~~(ii)~~ (2) **Civil Complaints.** Any City officer or employee who believes he or she  
19 has been the subject of retaliation in violation of ~~S~~subsection (a) of this Section 4.115 may  
20 bring a civil action against the City officer or employee who committed the violation. Such  
21 action must be filed no later than two years after the date of the retaliation.

22 ~~(iii)~~ (3) **Burden of Establishing Retaliation.** In order to establish under this  
23 Section 4.115 that retaliation ~~occurred under this Section~~, a complainant in a civil action must  
24 demonstrate, or the Ethics Commission in an administrative proceeding must determine, by a  
25 preponderance of the evidence, that the complainant's engagement in activity protected under

1   §subsection (a) was a substantial motivating factor for the adverse employment action. The  
2   ~~employer respondent~~ may rebut this claim if ~~#~~ the respondent demonstrates by a preponderance  
3   of the evidence that he, she, or it would have taken the same employment action irrespective of  
4   the complainant's participation in protected activity.

5                   **(4) Duty to Assist with Retaliation Complaints.** *Supervisors who receive a complaint*  
6   *alleging retaliation under this Chapter 1 must keep the complaint confidential and immediately assist*  
7   *the complainant by referring the complainant to the Ethics Commission and documenting the referral*  
8   *in writing. Documentation must include the date and time of the referral and that the complaint was*  
9   *about retaliation. Supervisors who fail to comply with this subsection (b) are subject to the penalties*  
10   *and remedies set forth in subsection (c).*

11                   (c) PENALTIES AND REMEDIES.

12                   ~~(i)~~ **(1) Charter Administrative Penalties.** Any City officer or employee who  
13   violates §subsection (a) of this Section 4.115 may be subject to administrative penalties  
14   pursuant to Charter Section C3.699-13.

15                   **(2) Redress for Retaliatory Employment Action.** *Following an administrative hearing*  
16   *and after making a finding that an adverse employment action has been taken for purposes of*  
17   *retaliation, the Ethics Commission may, subject to the Charter's budgetary and civil service provisions,*  
18   *recommend the cancellation of the retaliatory termination, demotion, suspension or other adverse*  
19   *employment action.*

20                   ~~(ii)~~ **(3) Discipline by Appointing Authority.** Any City officer or employee who  
21   violates §subsections (a) or (b)(4) of this Section 4.115 shall be subject to disciplinary action up  
22   to and including dismissal by his or her appointing authority. If no disciplinary action is taken  
23   by the appointing authority, the Ethics Commission may refer the matter to the Civil Service  
24   Commission for action pursuant to Charter Section A8.341.

1            ~~(iii)~~ (4) **Civil Penalties.** Any City officer or employee who violates ~~Subsection~~  
2 (a) of this Section 4.115 may be personally liable in a civil action authorized under ~~Subsection~~  
3 ~~(b)(ii)~~ subsection (b)(2) of this Section for a civil penalty not to exceed ~~\$5,000~~ \$10,000.

4            (d) RESERVATION OF AUTHORITY.

5            ~~(i)~~ (1) **Civil Service Commission.** Nothing in this Section 4.115 shall interfere  
6 with the powers granted to the Civil Service Commission by the *San Francisco* Charter.

7            ~~(ii)~~ (2) **Appointing Authority.** Nothing in this Section 4.115 shall interfere with  
8 the power of an appointing officer, manager, or supervisor to take action with respect to any  
9 City officer or employee, provided that the appointing officer, manager, or supervisor  
10 reasonably believes that such action is justified on facts separate and apart from the fact that  
11 the officer or employee filed a complaint as set forth in Section 4.105(a), attempted to file such a  
12 complaint in good faith, or cooperated with an investigation of such a complaint. ~~filed a complaint~~  
13 ~~with, or cooperated with, an Ethics Commission investigation of such complaint; or filed a complaint~~  
14 ~~with or provided information to the Controller, District Attorney, City Attorney or the complainant's~~  
15 ~~department.~~

16            (e) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare,  
17 and each City department shall post a notice of whistleblower protections. The notice shall be  
18 posted in a location that is conspicuous and accessible to all employees.

19            (f) WHISTLEBLOWER PROTECTION AWARENESS TRAINING.

20            (1) The Controller, in collaboration with the Ethics Commission, shall prepare, and all  
21 City departments shall distribute, materials to publicize and promote whistleblower protections as part  
22 of each department's new hire training programs.

23            (2) The Ethics Commission, in collaboration with the Controller and Department of  
24 Human Resources, shall prepare, and all City departments shall distribute, materials to publicize and  
25 promote supervisors' responsibilities under this Chapter 1. In addition, the Department of Human

1 Resources, in collaboration with the Controller and Ethics Commission, shall prepare web-based  
2 training for supervisors regarding their responsibilities under this Chapter 1, which shall be  
3 implemented by January 1, 2019. This training must be provided to all City supervisors annually by  
4 April of each year thereafter.

5 **SEC. 4.117. PROTECTION OF WHISTLEBLOWERS - CITY CONTRACTORS.**

6 (a) RETALIATION PROHIBITED. No City officer or employee may take steps to terminate a  
7 contract with a City contractor; refuse to use a City contractor for contracted services; request that a  
8 City contractor terminate, demote, or suspend one of its employees; or take other similar adverse  
9 action against any City contractor or employee of a City contractor because the contractor or the  
10 contractor's employee:

11 (1) filed a complaint with any supervisor within a City agency alleging that a City  
12 officer or employee engaged in improper government activity, misused City funds, caused deficiencies  
13 in the quality and delivery of government services, or engaged in wasteful and inefficient government  
14 practices;

15 (2) filed a complaint with any supervisor within a City agency alleging that another  
16 City contractor, or employee of another City contractor, engaged in unlawful activity, misused City  
17 funds, caused deficiencies in the quality and delivery of government services or engaged in wasteful  
18 and inefficient government practices; or

19 (3) provided any information in connection with or otherwise cooperated with any  
20 investigation conducted under this Chapter 1.

21 **(b) COMPLAINTS OF RETALIATION.**

22 (1) Administrative Complaints. Any City contractor or employee of a City contractor,  
23 who believes it, he, or she has been the subject of retaliation in violation of subsection (a) of this  
24 Section 4.117 may file a complaint with the Ethics Commission. The complaint must be filed no later  
25 than two years after the date of the alleged retaliation.

1           The Ethics Commission shall investigate complaints of violations of subsection (a) of  
2 this Section 4.117 pursuant to the procedures specified in Charter Section C3.699-13 and the  
3 regulations adopted thereunder. The Ethics Commission may decline to investigate complaints  
4 alleging violations of subsection (a) if it determines that the same or similar allegations are pending  
5 with or have been finally resolved by another administrative or judicial body. Nothing in this  
6 subsection shall preclude the Ethics Commission from referring any matter to any other City  
7 department, commission, board, officer, or employee, or to other government agencies for investigation  
8 and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the  
9 Department of Human Resources with a recommendation. The Ethics Commission may require any  
10 City department to provide a written report regarding the department's investigation and any action  
11 that the department has taken in response to the Ethics Commission's referral, within a time frame that  
12 the Ethics Commission shall specify.

13           (2) **Burden of Establishing Retaliation.** In order to establish that retaliation occurred  
14 under this Section 4.117, the Ethics Commission in an administrative proceeding must determine, by a  
15 preponderance of the evidence, that the complainant's engagement in activity protected under  
16 subsection (a) was a substantial motivating factor for the adverse action. The respondent may rebut  
17 this claim if it demonstrates by a preponderance of the evidence that it would have taken the same  
18 adverse action irrespective of the complainant's participation in protected activity.

19           (c) **PENALTIES AND REMEDIES.**

20           (1) **Administrative Penalties.** Any City officer or employee who violates subsection (a)  
21 of this Section 4.117 may be subject to administrative penalties pursuant to Charter Section C3.699-13.

22           (2) **Redress for Retaliatory Adverse Action.** Following an administrative hearing and  
23 after making a finding that an adverse action has been taken for purposes of retaliation, the Ethics  
24 Commission may, subject to the Charter's budgetary and contracting provisions, order the cancellation  
25 of retaliatory adverse action taken against a City contractor or employee of a City contractor.

1                   (3) Discipline by Appointing Authority. Any City officer or employee who violates  
2 subsection (a) of this Section 4.117 shall be subject to disciplinary action up to and including dismissal  
3 by his or her appointing authority. If no disciplinary action is taken by the appointing authority, the  
4 Ethics Commission may refer the matter to the Civil Service Commission for action pursuant to Charter  
5 Section A8.341.

6                   (d) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare, and each  
7 City department shall post, a notice of the whistleblower protections established by this Section 4.117.  
8 City contractors shall distribute the notice of protections to all of their employees.

9                   **SEC. 4.120. CONFIDENTIALITY.**

10                  (a) WHISTLEBLOWER IDENTITY. City officers and employees shall treat as confidential  
11 the identity of any person who files a complaint as set forth in Section 4.105(a). A complainant may  
12 voluntarily disclose his or her identity. Any individual who files a complaint under Section 4.105 of  
13 this Chapter may elect to have his or her identity kept confidential as provided by Charter Section  
14 C3.699-13(a). Such election must be made at the time the complaint is filed.

15                  (b) COMPLAINTS AND INVESTIGATIONS. City officers and employees shall treat as  
16 confidential complaints filed under Sections 4.105, 4.115, and 4.117, and related information,  
17 including but not limited to materials gathered and prepared in the course of investigating such  
18 complaints, and deliberations regarding such complaints. The Ethics Commission shall treat as  
19 confidential complaints made under Section 4.105 of this Chapter, and related information, including  
20 but not limited to materials gathered and prepared in the course of investigation of such complaints,  
21 and deliberations regarding such complaints, as provided by Charter Section C3.699-13(a).

22                  (c) PENALTIES. Except as provided in subsection (d), violations of subsections (a) and (b)  
23 may be subject to the administrative proceedings and penalties set forth in Charter Section C3.699-13,  
24 in addition to disciplinary action up to and including dismissal by his or her appointing authority.

25                  (e) ~~(d)~~ EXCEPTIONS.

1           (i) (1) Conduct of Investigations. Nothing in this Section 4.120 shall preclude the  
2 Controller's Office, Ethics Commission, District Attorney, and City Attorney from disclosing the  
3 identity of an individual or other information to the extent necessary to conduct its  
4 investigation.

5           (2) Legal Proceedings. Nothing in this Section 4.120 shall preclude City officers and  
6 employees from disclosing the identity of an individual or other information relating to a complaint to  
7 the extent required by the rules governing an administrative or court proceeding.

8           (ii) (3) Referrals. Nothing in this Section 4.120 shall preclude the Ethics  
9 Commission from referring any matter to any other City department, commission, board,  
10 officer, or employee, or to other government agencies, for investigation and possible  
11 disciplinary or enforcement action.

12           Section 2. Effective Date. This ordinance shall become effective 30 days after  
13 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
14 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
15 of Supervisors overrides the Mayor's veto of the ordinance.

16           Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors  
17 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,  
18 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal  
19 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment  
20 additions, and Board amendment deletions in accordance with the "Note" that appears under  
21 the official title of the ordinance.

22 APPROVED AS TO FORM:  
23 DENNIS J. HERRERA, City Attorney

24 By:   
25 ANDREW SHEN, Deputy City Attorney

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## LEGISLATIVE DIGEST

[Campaign and Governmental Conduct Code - Expanding Whistleblower Protections]

**Ordinance amending the Campaign and Governmental Conduct Code to provide additional retaliation protections for whistleblowers, establish retaliation protections for City contractors, increase the remedies available for whistleblowers who have suffered retaliation, and establish greater confidentiality protections for whistleblowers' identities.**

### Existing Law

The City's Whistleblower Protection Ordinance ("WPO"), Article IV of the S.F. Campaign & Gov'tal Conduct Code ("C&GC Code"), establishes a framework for the filing of whistleblower complaints and seeks to protect whistleblowers from retaliatory employment actions.

#### 1. Protection of whistleblowers

The WPO prohibits City employees and officers from retaliating – *i.e.*, taking adverse employment action such as termination, demotion, etc. – against whistleblowers who have filed a complaint alleging improper government activity. C&GC Code § 4.115(a).

#### 2. Penalties and remedies

City employees and officers who unlawfully retaliate against whistleblowers are subject to administrative or civil penalties of up to \$5,000 per violation. They are also subject to discipline, up to and including dismissal by his or her appointing authority. *Id.* § 4.115(c).

#### 3. Confidentiality of whistleblowers' identities

Whistleblowers may elect to keep their identities confidential after filing a complaint of improper government activity. *Id.* § 4.120(a). The WPO does not directly provide for any penalties or remedies for unlawful disclosure of a whistleblower's identity; but such disclosure may be actionable pursuant to Campaign and Governmental Conduct Code 3.228.

### Amendments to Current Law

#### 1. Protection of whistleblowers

The proposed amendments would protect whistleblowers if they attempted to file a whistleblower complaint but, in good faith, did not file the complaint with the appropriate City department or official. The amendments would also require supervisors to assist their subordinates with the filing of whistleblower retaliation complaints with the Ethics Commission.

The amendments would also protect City contractors and their employees from whistleblower retaliation.

2. Penalties and remedies

The amendments would increase the civil penalties available for whistleblower retaliation from \$5,000 to \$10,000. The amendments would also allow the Ethics Commission to pursue the cancellation of or provide redress for any retaliation against a whistleblower, subject to the Charter's budgetary and employment provisions.

3. Confidentiality of whistleblowers' identities

The amendments provide explicit penalties for disclosure of a whistleblower's confidential identity: any City officer or employee who discloses the identity of any complainant with the knowledge that the complainant elected to keep his or her identity confidential would be subject to administrative penalties of up to \$5,000 per violation.

Background Information

In June 2015, the San Francisco Civil Grand Jury issued a report entitled, "San Francisco's Whistleblower Protection Ordinance Is In Need of Change," addressing potential issues with the WPO. In response to this Civil Grand Jury report, the Ethics Commission developed the amendments proposed by this ordinance.

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**From:** dratler@me.com  
**Sent:** Wednesday, September 05, 2018 12:15 PM  
**Subject:** RE: Comments on file No. 160689 (180317)

Please add my comments.

Thank you,

Jerry Dratler

---

**From:** [dratler@me.com](mailto:dratler@me.com) [<mailto:dratler@me.com>]  
**Sent:** Wednesday, September 05, 2018 11:43 AM  
**To:** Somera, Alisa (BOS) <[alisa.somera@sfgov.org](mailto:alisa.somera@sfgov.org)>  
**Subject:** Comments on file No. 160689

My comments on the proposed legislation amending the Campaign and Government Conduct Code (file No. 160689) reflect my service on the 2014/15 Civil Grand Jury that issued the report titled "Whistleblower Protection Ordinance is in Need of Change" and my service as a member of the Citizens General Obligation Bond Oversight Committee (CGOBOC), the organization that exercises oversight over the City Services Auditor (CSA) and the CSA's administration of the Whistleblower program.

My comments are consistent with the Governmental Accountability Project's (GAP) international best practices. GAP is a non-profit law firm that specializes in protection for whistleblowers. GAP's eight-page *International Best Practices for Whistleblower Policies* (attached) reflects the GAP's 35 years of lessons learned.

My comments also reflect the CSA's handling of a whistleblower complaint I submitted regarding the S. F. Department of Building Inspection's (DBI) failure to enforce Building Code Section 103A which deals with unpermitted demolitions. My complaint detailed the removal of 88% of the home at 655 Alvarado Street without a demolition permit and DBI's failure to enforce the penalties for unpermitted demolition.

I believe my complaint was referred to the department where the infraction occurred and not investigated by the CSA. When I inquired into the status of my complaint I was told "appropriate action was taken, and the Whistleblower program now considers your complaint closed". When I made further inquiries, I was told that San Francisco Campaign and Governmental Code Sec. 4.123 prohibited the CSA from disclosing the findings of my complaint. Sec. 4.123 deals with whistleblower protection and does not prohibit the CSA from releasing an investigation's findings.

**My request to you is to amend Sec. 4.123 to require the CSA to release summary findings of Whistleblower complaints unless the whistleblower requests anonymity.**

An effective whistleblower complaint program requires an honest dialog with the complainant and public disclosure of the investigation findings, not the actual investigation. GAP best practice number 20 (attached) calls for a credible action process where the final whistleblower report is released to the public with the whistleblower's comments unless the whistleblower requests anonymity.

If my complaint was referred to DBI, I should have been able to secure a copy of the written report findings DBI was required to submit to the CSA (4.107(e)). If my complaint was investigated by the CSA, I should have been entitled to receive a copy of their investigation findings.

A whistleblower program that lacks public oversight is not credible and therefore, ineffective. As a member of CGOBOC I was also denied access to whistleblower complaint investigation findings. I was prohibited from fulfilling the sworn requirements of my CGOBOC appointment. **I request that you include a reporting requirement for investigation findings in your amendment of the Campaign and Governmental Code of Conduct.**

**Additional comments are listed below.**

- Extending whistleblower coverage to S. F. City contractors and their employees is an important enhancement to the existing whistleblower policy and consistent with the GAP's best practice number 5.
- GAP believes personal financial accountability for reprisals by City employees is the most effective method for preventing reprisals. Increasing the current \$5,000 limit to \$10,000 and indexing the limit for inflation is not a significant financial deterrent. A more reasonable financial limit for personal liability for a city employee who harasses a whistleblower would be the loss of one year's salary. GAP's best practice number 18 does not impose a limit.
- The proposed revision does not provide specific protections for City employees and contractors to refuse to violate the law and specific protection in the area of "duty speech". Duty speech involves the need for City employees or contractors to blow the whistle when their job involves acting as an organizational check and balance. This is number 1 on GAP's list of best practices.

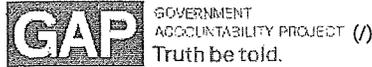
For example, the improper disposal of contaminated soil at the Hunters Point Naval Shipyard, mismanagement of the Central Subway project and demolition dust mitigation at Candle Stick stadium might have been disclosed earlier if City employees and contractors had specific whistleblower protections for "duty speech"

- The proposed revision does not include compensation for legal fees and other costs where the whistleblower's complaint prevails. Few city employees can afford to mount a legal challenge to direct or indirect harassment without the prospect of knowing they will be reimbursed for the legal fees and other costs if their claim prevails. Reimbursement for attorney fees and litigation costs should be available for whistleblowers who prevail. Numbers 14 and 16 on GAP's list of best practices address compensation for legal fees and comprehensive relief of direct and indirect costs.

The Government Accountability Project believes that whistleblower programs that are largely symbolic and lack real protections for whistleblowers are counterproductive. The GAP labels token Whistleblower laws "cardboard shields" because they believe anyone who relies on them for protection is sure to die professionally. Please implement meaningful changes that turn San Francisco's cardboard shield whistleblower program into a metal shield.

This site respects your privacy. GAP will not record your IP address or browser information. A [detailed privacy statement \(/privacy-policy\)](#) can be found here.

X



Protecting Whistleblowers since 1977

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[Issue Areas \(/safe-haven-whenever-there-are-whistleblowers\)](#)

[Education and Resources \(/education-resources\)](#)   [Blog \(/blog\)](#)   [Events \(/events\)](#)

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# INTERNATIONAL BEST PRACTICES FOR WHISTLEBLOWER POLICIES

[🖨️ \(https://www.whistleblower.org/print/2299\)](https://www.whistleblower.org/print/2299)

By: Tom Devine, Legal Director  
July 22, 2016

The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers – employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has been a leader in the public campaigns to enact or defend nearly all United States national whistleblower laws; and played partnership roles in drafting and obtaining approval for the original Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption and whistleblower protection policies for staff and contractors at the African Development Bank, the Asian Development Bank, the OAS, and the United Nations.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last three decades has revealed numerous lessons learned, which have steadily been solved on the U.S. federal level through amendments to correct mistakes and close loopholes.

GAP labels token laws as “cardboard shields,” because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as “metal shields,” behind which an employee’s career has a fighting chance to survive. The checklist of 20 requirements below reflects GAP’s 35 years of lessons learned on the difference. All the minimum concepts exist in various employee protection statutes currently on the books. These “best practices” standards are based on a compilation of national laws from the 31 nations with minimally credible dedicated whistleblower laws, as well as Intergovernmental Organization policies, including those at the United Nations, World Bank, African Development Bank, Asian Development Bank, and Inter-American Development Bank. Nations covered by this study are identified in Attachment 1, and copies of the laws can be downloaded from GAP’s website, [www.whistleblower.org](http://www.whistleblower.org) (<http://www.whistleblower.org>).

## I. **SCOPE OF COVERAGE**

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.

**1. Context for Free Expression Rights with “No Loopholes”.** Protected whistleblowing should cover “any” disclosure that would be accepted as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. The consistent standard is for the whistleblower to reasonably believe the information is evidence of misconduct. Motives should not be a relevant factor, if the whistleblower believes the information is true. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or

to designated law enforcement or legislative offices. The key criterion is that public freedom of expression be protected if necessary as the only way to prevent or address serious misconduct. It also is necessary to specify that disclosures in the course of job duties are protected, because most retaliation is in response to "duty speech" by those whose institutional role is blowing the whistle as part of organizational checks and balances.

**Best Practices:** United Nations Secretariat whistleblower policy (UN), section 4; World Bank Staff Rule 8.02 (WB), section 4.02; Australian Public Interest disclosure Act, ("Aus. PIDA"), Part 2, Div. 2; Irish Public Disclosure Act ("Irish PDA"), Sec. 10; United Kingdom (UK) Public Interest Disclosure Act of 1998 ("PIDA"), c. 23, amending the Employment Rights Act of 1996, c.18), section 43(G); Protected Disclosures Act of 2000 ("PDA"); Act No. 26, GG21453 of 7 Aug. 2000 (S. Afr.), section 7-8; Anti-Corruption Act of 2001 ("ACA") (Korea – statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 ("Ghana WPA"), section 4; Japan Whistleblower Protection Act, Article 3; Romanian Whistleblower's Law ("Romania WPA"), Article 6; Whistleblower Protection Act of 1989 ("WPA") (U.S. federal government), 5 USC 2302(b)(8); Consumer Products Safety Improvement Act ("CPSIA") (U.S. corporate retail products), 15 USC 2087(a); Federal Rail Safety Act ("FRSA") (U.S. rail workers) 49 USC 20109(a); National Transportation Security Systems Act ("NTSSA") (U.S. public transportation) 6 USC 1142(a); Sarbanes Oxley Reform Act ("SOX") (U.S. publicly-traded corporations) 18 USC 1514(a); Surface Transportation Assistance Act ("STAA") (U.S. corporate trucking industry) 49 USC 31105(a); American Recovery and Reinvestment Act of 2009 ("ARRA"), (U.S. Stimulus Law), P.L.111-5, Section 1553(a)(2)-(4); Patient Protection and Affordable Care Act ("ACA"), (U.S. health care), sec. 1558, in provision creating section 18C of Fair Labor Standards Act, sec. 18B(a)(2)(4); Food Safety Modernization Act ("FSMA") (U.S. food industry), 21 USC 1012(a)(1)-(3); Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") (U.S. financial services industry), sec. 1057(a)(1)-(3); Bosnia WPA, Art. 2(d); Irish Public Disclosures Act (Irish PDA), secs. 7, 10; Japan Whistleblower Protection Act (WPA), Art. 1; Serbian Law for the Protection of Whistleblowers (Serbian WPA), Art. 2.2, 2.5, 19, Liberia Executive Order 62, Protection of Whistleblowers ("Liberia EO"), Sec. 4(1)(a-j), 11; Slovakia WPA, sec. 2(2); OAS Staff Rule 101.11 Procedures for Whistleblowers and Protections Against Retaliation (OAS Staff Rule), sec. (c)(vi).

**2. Subject Matter for Free Speech Rights with "No Loopholes".** Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

**Best Practices:** UN ST/SGB/2005/21, section 2.1(a); World Food Programme (WFP) Executive Circular ED2008/003, section 5; World Bank Staff Rule 8.02, section 1.03; African Development Bank (AfDB) "Whistleblowing and Complaints Handling Policy, section 4; The Whistleblowers Protection Act, 2010 ("Uganda WPA"), section II.2; PIDA, (U.K.); PDA, section 1(i)(S. Afr.); Irish PDA, Sec. 5; New Zealand Protected Disclosures Act ("NZ PDA"), 2000, section 3(1), 6(1); ACA (Korea), Article 2; Public Service Act ("PSA"), Antigua and Barbuda Freedom of Information Act, section 47; R.S.O., ch. 47, section 28.13 (1990) (Can.); Ghana WPA, section 1; WPA (U.S. federal government), 5 USC 2302(b)(8); FRSA (U.S. rail workers) 49 USC 20109(a)(1); NTSSA (U.S. public transportation) 6 USC 1142(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1); ACCR (U.S. Stimulus Law) P.L.111-5, Section 1553(A)(1)-(5); ACA (U.S. health care) *id.*; FSMA (U.S. food industry) *id.*; Dodd Frank (U.S. financial services industry) *id.*; Aus. PIDA, sec. 2; Belgium WPA, Art. 2; Bosnia WPA, Art. 2(b); WPA, Art. 2; Irish PDA, sec. 7; Serbian WPA, Art. 2.1, 13; Liberia EO, sec. 1(f), 4(1)(a-j); Zambia PIDA, sec 2. 2, 11; Malta Protection of the Whistleblower Act 2013 (Malta PWA), Art. 1(2); OAS Staff Rule, sec. (b)(v)

**3. Right to Refuse Violating the Law.** This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

**Best Practices:** Asian Development Bank (ADB) Administrative Order No. 2.10, section 3.5 (see AO 2.04, section 2.1 (f) for corresponding definition of misconduct); World Bank Staff Rule 8.02, section 2.07 (see Staff Rule 8.01, section 2.01 for definition of misconduct); WPA (U.S. federal government) 5 USC 2302(b)(9); FRSA (U.S. rail workers) 49 USC 20109(a)(2); NTSSA (U.S. public transportation) 6 USC 1142(a)(2); CPSIA (U.S. corporate retail products) 15 USC 2087(a)(4); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1)(B); ACA (U.S. health care) sec. 18C(a)(5); FSMA (U.S. food industry) 21 USC 1012(a)(4); Dodd Frank (U.S. financial services industry) sec. 1057(a)(4); Liberia EO, sec. 13(b); OAS Staff Rule, sec. (a)(iii).

**4. Protection Against Spillover Retaliation.** The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as "assisting whistleblowers," (to guard against guilt by association), and individuals who are "about to" make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

**Best Practices:** World Bank Staff Rule 8.02, section 2.04; AfDB Whistleblowing and Complaints Handling Policy, section 6; Organization of American States, "Draft Model Law to Encourage and Facilitate the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses" ("OAS Model Law"), Article 28; Aus. PIDA, Provisions

("Prov.") 13, 57; ACA (Korea), Art. 31; NZ PDA, section 4(3); WPA (U.S.), 5 USC sections 2302(b)(8) (case law) and 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regular Commission, Department of Energy and regulated corporations), 42 USC 5851(a); FRSA (U.S. rail workers) 49 USC 20109(a); NTSSA (U.S. public transportation) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a); ACA (U.S. health care) sec. 18C(a); FSMA (U.S. food industry) 21 USC 1012(a); Dodd Frank (U.S. financial services industry) Sec. 1057; Irish PDA, sec.12; Japan WPA, Art. 3; Serbian WPA, Art. 6-9; OAS Staff Rule, secs. (a)(ii), (b)(vi).

**5. "No Loopholes" Protection for All Citizens With Disclosures Relevant to the Public Service Mission.** Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization's mission. It should not matter whether they are full time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines an organization's mission, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization's activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings. Any increasing number of global statutes do not limit protection to employees, but rather protect "any person" who discloses misconduct. A list of nations with rights broader than the employment context is enclosed as Attachment 2.

**Best Practices:** AfDB Whistleblowing and Complaints Handling policy, sections 5.1 & 6.2; ADB Administrative Order No. 2.10, section 8; Inter-American Development Bank (IDB) Staff Rule No. PE-328, section 2.1 & 2.2; Anti-Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]); Aus. PIDA, Prov. 13; NZPDA, section 19A; PIDA (U.K.), sections 43 (K)(1)(b-d); ACA (Korea), Art. 25; Whistleblower Protection Act of 2004 (Japan WPA), section 2; Ghana WPA, sec. 2; Slovenia Integrity and Prevention of Corruption Act (Slovenia Anti-Corruption Act), Article 26; Uganda WPA, section II.3; Foreign Operations Appropriations Act of 2005 ("Foreign Operations Act") (U.S. MDB policy) section 1505(a)(11) (signed November 14, 2005); False Claims Act (U.S. government contractors), 31 USC 3730(h); sections 8-9; STAA (U.S. corporate trucking industry) 49 USC 31105(j); ACCR of 2009 (U.S. Stimulus Law) P.L.111-5, Section 1553(g)(2)-(4); Dodd Frank, Sec. 922(h)(1); Jam PDA, Part 1.2; Kosovo Law No. 04/L-043 on Protection of Informants (Kosovo LPI), Art.2, Sec. 1.1; Serbian WPA, Art. 2.2, 2.3; Liberia EO, sec. 1(a), (e); Uganda WPA, secs. 2, 3; Zambia PIDA, secs. 1, 2(1), 3(1); OAS Staff Rule, sec. (e)(i).

**6. Reliable Confidentiality Protection.** To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect. Confidentiality goes beyond just promising not to reveal a name. It also extends to restrictions on disclosure of "identifying information," because often when facts are known only to a few that information easily can be traced back to the source and are the equivalent of a signature. Further, almost no whistleblower can guarantee absolute confidentiality, because testimony may be required for a criminal conviction or other essential purpose. Under those circumstances, a best practice confidentiality policy provides for as much advance notice as possible to the whistleblower that his or her identity must be revealed.

**Best Practices:** ADB Administrative Order No. 2.10, sections 3.2, 5.1 & 5.4 and Administrative Order No. 2.04, section 4.2; AfDB Whistleblowing and Complaints Handling Policy, sections 6.1 & 6.9.4; WFP ED2008/003, section 10; UN Sec. 16; ST/SGB/2005/21, section 5.2; OAS Model Law, Articles 10 and 11, 49; PSA (Can.), sections 28.17(1-3), 28.20(4), 28.24(2), 28.24(4); Aus. PIDA, Prov. 20, 21; Irish PDA, NZ PDA section 19; ACA (Korea), Articles 15 and 33(1); Slovenia Anti-Corruption Act, Article 23 (4), (6) and (7); Uganda WPA, sections VI.14 and 15; WPA (U.S.) 5 USC sections 1212(g), 1213(h); FRSA (U.S. rail workers) 49 USC 20109(i); NTSSA (U.S. public transportation) 6 USC 1142(h); STAA (U.S. corporate trucking industry) 49 USC 31105(h); Dodd Frank (U.S. financial services) sec. 748(h)(2) and 922(h)(2); Aus. PIDA, sec. 24; Belgium WPA, Art. 8, sec. 1, Art. 9, sec. 1; Irish PDA, sec. 16; Jam. PDA, section 24; Serbian WPA, Art. 10, 14, 18; Liberia EO, sec. 7(b), 9(c) and (d), 10(e); Malaysian Act 711, Whistleblower Protection Act 2010 (Malaysia WPA), Sec. 8; Uganda WPA (sec. 14); Zambia PIDA, secs 12, 54.; Malta PWA, Arts. 6(1), (4), 18(1); OAS Staff Rule, secs. (c)(iv), (v); Albania Law NR 60/2016 on Whistleblowing and the Protection of Whistleblowers ("Albania WPA"), Articles 15, 17-2 and 3.

**7. Protection Against Unconventional Harassment.** The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from civil liability such as defamation suits, and the most chilling form of retaliation – criminal investigation or prosecution.

**Best Practices:** ADB Administrative Order No. 2.10, section 2.11; IDB Staff Rule No. PE-328, sections 2.41-2.44; UN ST/SGB/2005/21, section 1.4; WFP ED2008/003, section 4; World Bank Staff Rule 8.02, section 2.04; OAS Model Law, Article 28; Aus. PIDA, Prov. 10, 13, 14, 19; Irish PDA, Sec. 3, 12; ACA (Korea), Article 33; Uganda WPA, section V.9(2), V.10, and V.11; WPA (U.S. federal government), 5 USC 2302(b)(8) and associated case law precedents; FRSA

(U.S. rail workers 49 USC 20109(a); NTSSA (U.S. public transportation workers) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); SOX (U.S. publicly traded corporations) 18 USC 1514(a); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(a); ACA (U.S. health care) Sec. 18C; FSMA (21 USC 1012(a); Dodd Frank (U.S. financial services industry) sec. 1057(a); Aus. PIDA, secs. 15, 23; Bosnia WPA, Art. 6; Irish PDA, secs. 2, 14, 15; Jamaican Public Disclosure Act, 2011, (Jam. PDA), section 2, 15.2, and 16; Japan WPA, Art. 5; Peru Law. No. 29542, Articles 7, 22; Serbian WPA, Art. 2.7, 21; Liberia EO, Sections 1(a), (g) and (h), 12; Malaysia WPA, Sections 7(b), 9; New Zealand PDA, Sec. 18.; Uganda WPA, secs. 9(2), 10, 13; Malta PWA, Arts. 1(2), 4(1), 19; OAS Staff Rule, secs. (b)(vi),(e)(i); Albania WPA, Article 18.

**8. Shielding Whistleblower Rights From Gag Orders.** Any whistleblower law or policy must include a ban on “gag orders” through an organization’s rules, policies or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech. ;

**Best Practices:** WFP ED/2008/003, sections 8 and 11; World Bank Staff Rule 8.02, para. 4.03; Aus. PIDA, Prov. 10(1)(b) and 10(2)(b), 24, Irri 75; Irish PDA, Sec. 2; NZ PDA section 18; PIDA (U.K.), section 43(J); PDA (South Africa), section 2(3)(a, b); Ghana WPA, sec. 31; Uganda WPA, section V.12 and V.13; WPA (U.S.), 5 USC 2302(b)(8); Transportation, Treasury, Omnibus Appropriations Act of 2009 (U.S.), section 716 (anti-gag statute)(passed annually since 1988); FRSA (U.S. rail workers) 49 USC 20109(h); NTSSA (U.S. public transportation) 6 USC 1142(g); STAA (U.S. corporate trucking industry) 49 USC 31105(g); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(d)(1); ACA (U.S. health care) Sec 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(c)(2); Dodd Frank (U.S. financial services industry) sections 748(h)(3) and (n)(1), 922(h)(3) and 1057(c)(2); Aus. PIDA, sec 20; Belgium WPA, Art. 3; Art. 15 Jam. PDA, Sections 15, 20; Serbian WPA, Art. 3, 21; Liberia EO, Sec. 4 (1)(k,l); India Whistleblower Protection Act, sec. 4; Malaysian WPA, Sec 6(5). Slovakia Act of 16 October on certain measures concerning the reporting of antisocial activities and on amendments to certain laws (Slovakia WPA), section 1 underview; Uganda WPA, secs. 10, 13; Zambia PIDA, sec. 4; Malta PWA, Arts. 3, 21; Albania WPA, Article 17.4.

**9. Providing Essential Support Services for Paper Rights.** Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower’s rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. The U.S. Whistleblower Protection Act includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

**Best Practices:** United Nations Office of Staff Legal Assistance (for access to legal services)[1]; Aus. PIDA, Prov. 21, 58-63, 74; NZ PDA, sections 6B, 6C; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; WPA (U.S.), 5 USC 1212; Inspector General Act (U.S.) 5 USC app.; ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b); U.S. WPA, 5 USC 1212-1219; Belgium WPA, Art. 3; Art. 15; Jam. PDA, section 21; Serbian WPA, Art. 14; Liberia EO sec. 16, Slovakia WPA, sec. 16; Zambia PIDA, sec. 40(2)(b); Malta PWA, Art. 12(2); OAS Staff Rule, sec. (f)(iv).

## I. FORUM

The setting to adjudicate a whistleblower’s rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

**10. Right to Genuine Day in Court.** This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual’s case for any eventual day in a due process forum.

**Best Practices:** UN ST/SGB/2005/21, section 6.3; OAS Model Law, Articles 39, 40; Foreign Operations Act (U.S. policy for MDB’s), section 1505(11); Aus. PIDA, Part 2, Subdiv. B, Prov. 14; NZ PDA, section 17; PIDA (U.K.) Articles 3, 5; PDA (S. Afr.), section 4(1); ACA (Kor.), Article 33; Romania WPA, Article 9; Uganda WPA, sections V.9(3) and (4); WPA (U.S.), 5 USC 1221, 7701-02; Defense Authorization Act (U.S.) (defense contractors) 10 USC 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(4) and (c)-(f); FRSA (U.S. rail workers) 49 USC 20109(c)(2)-(4); NTSSA (U.S. public transportation) 6 USC 1142(c)(4)-(7); CPSIA (U.S. retail products) 15 USC 2087(b)(4)-(7); SOX (U.S. publicly traded corporations) 18 USC 1514(b); STAA (U.S. corporate trucking industry) 49 USC 31105 (c)-(e); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(3)-(5); ACA (U.S. health care) sec. 18C(b)(1); FMSA (U.S. food industry) 21 USC 1012(b)(4); Dodd Frank (U.S. financial services) sections 748(h)(1)(B)(i), 922(h)(1)(b)(1) and 1057(c)(4)(D); Irish PDA, Schedule 2; Serbian WPA, Art. 23, 2, 30; Liberia EO sec. 11(e); Malaysia WPA, Sec. 15; Uganda WPA, secs. 9(3) and (4); Zambia PIDA, sec. 49; Malta PWA, Art. 7; OAS Staff Rule, secs. (e)(iii) and (iv).

**11. Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent.** Third party dispute

resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether Intergovernmental Organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the U.S. Whistleblower Protection Act.

**Best Practices:** Foreign Operations Act (U.S. MDB policy) section 1505(a)(11); WPA (U.S. federal government labor management provisions), 5 USC 7121; OAS Staff Rule, sec. (f)(ii).

### **I. RULES TO PREVAIL**

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win.

**12. Realistic Standards to Prove Violation of Rights.** The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards for intergovernmental organizations such as the United Nations.

This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur "because of" the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests the whistleblower must pass to win a ruling that their rights were violated.

**Best Practices:** UN ST/SGB/2005/21, sections 5.2 & 2.2; WFP ED 2008/003, sections 6 and 13; World Bank Staff Rule 8.02, sec. 3.01; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.7; Foreign Operations Act, Section 1505(11); Whistleblower Protection Act (U.S. federal government) 5 USC 1214(b)(2)(4) and 1221(e); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(3); FRSA (U.S. rail workers) 49 USC 20109(c)(2)(A)(i); NTSSA (U.S. public transportation) 6 USC 1142(c)(2)(B); CPSIA (U.S. corporate retail products) 15 USC 2087 (b)(2)(B), (b)(4); SOX (U.S. publicly-traded corporations), 18 USC 1514(b)(2)(c); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(1); Aus. PIA, sec. 17; ACA, sec. 1558(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(2)(C) and (b)(4)(A); Dodd Frank (U.S. financial services industry) sec. 1057(b)(3); Bosnia WPA, Art. 2(b); Jam PDA, sec. 17; Serbian WPA, Art. 5.3, 11, 29; Liberia EO, sec. 1(m), 13(b); Norway Work Environment Act of 2005 (Norway Work Act), sec. 2.5; Slovenia Anticorruption Act (Slovenia ACA), Art. 25(5); OAS Staff Rule, sec. (b)(7).

**13. Realistic Time Frame to Act on Rights.** Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common law rights and are preferable.

**Best Practices:** ADB Administrative Order No. 2.10, section 6.5; WFP ED2008/003, section 7; UN ST/SGB/2005/21, section 2.1(a) & 5.1 (no statute of limitations); PIDA (U.K.), section 48.3; PDA (S. Afr.), section 4(1); Irish PDA, Sec. 24, Schedule 2(6); NZ PDA, section 17; ACA (Kor.) (no statute of limitations); WPA (U.S. federal employment) 5 USC 1212 (no statute of limitations); False Claims Act (U.S. government contractors), 42 USC 3730(h) and associated case law precedents; Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(1); FRSA (U.S. railroad workers) 49 USC 20109(d)(2)(A)(ii); NTSSA (U.S. public transportation) 6 USC 1142(c)(1); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b)(1); ACA (U.S. health care industry) sec. 18C(b)(1); FSMA (U.S. food industry) 21 USC 10120(b)(1); Dodd Frank (U.S. financial services industry) sec. 748(h)(1)(B)(iii), 922(h)(1)(B)(iii) and sec. 1057(c)(1)(A); Irish PDA, Schedule 2; Israel PEL, sec. 5(a); Serbian WPA, Art. 4; Zambia PIDA, sec. 42(3). Zambia PIDA, secs. 42(3), 56; OAS Staff Rule, sec. (e)(ii).

### **I. RELIEF FOR WHISTLEBLOWERS WHO WIN**

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by holding the wrongdoer accountable.

**14. Compensation with "No Loopholes".** If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

**Best Practices:** AfDB Whistleblowing and Complaints Handling Policy, sections 6.5 & 6.6 and Statute of the Administrative Tribunal of the African Development Bank Art. XIII (1); OAS Model Law, Articles 17 and 18; Foreign Operations Act (U.S. policy for MDB's), Section 1505(11); Aus. PIDA, Prov. 14, 16; NZ PDA, section 17; ACA (Korea), Article 33; Irish PDA, Sec. 24; PIDA (U.K.), section 4; WPA (U.S. federal government employment), 5 USC 1221(g)(1);

False Claims Act (U.S. government contractors), 31 USC 3730(h); Defense Authorization Act (U.S.) (defense contractors), 10 USC 2409(c)(2); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(c)(3)(B) and (d); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(B); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b)(2)(A), (B), and (b)(3); ACA (U.S. health care) sec. 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(3)(B) and (b)(4)(B); Dodd Frank (U.S. financial industry) sec. 1057(c)(4)(B)(i) and 4(D)(ii); Bosnia WPA, Art. 2(f); Serbian WPA, Art. 22, 26; Liberia EO, sec. 13(a); Slovakia WPA, secs. 7-10, 13; Zambia PIDA, sec. 13; Malta PWA, Arts. 7.8.

**15. Interim Relief.** Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years.

**Best Practices:** UN S T/SGB/2005/21, Section 5.6 and Statute of the United Nations Dispute Tribunal, Article 10(2); ADB Administrative Order No. 2.10, section 7.1; AfDB Whistleblowing and Complaints Handling Policy, sections 6.6.1, 6.6.5 & 9.6; World Bank Staff Rule 8.02, sec. 2.05; OAS Model Law, Articles 17, 32; Aus. PIDA, Prov. 15; U.K. PIDA section 9; Irish PDA, Sec. 11, Schedule 1; NZ PDA, section 17; WPA (U.S. federal government), 5 USC sections 1214(b)(1), 1221(c); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); SOX (U.S. publicly-traded corporations), 5 USC 1214(b)(1); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012(b)(2)(B); Dodd Frank, sec. 748(h)(1)(B)(i), 922(h)(1)(B)(i) and sec. 1057(b)(2)(B); Irish PDA, Schedule 1; Serbian WPA, Art. 32-35; Malaysian WPA, sections 15(1)(b), 17 and 18(b); Slovakia WPA, sec. 7; Zambia PIDA, secs. 52-53; Malta PWA, Art. 7; OAS Staff Rule, sec. (e)(v).

**16. Coverage for Attorney Fees.** Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

**Best Practices:** AfDB Whistleblowing and Complaints Handling Policy, section 6.5.4; Statute of the Administrative Tribunal of the International Monetary Fund, Art. XIV (4); Statute of the Administrative Tribunal of the Asian Development Bank, Art. X (2); OAS Model Law, Art. 17; Aus. PIDA, Prov. 18; NZ PDA section 17; WPA (U.S. federal government), 5 USC 1221(g)(2-3); False Claims Act (U.S. government contractors), 31 USC 3730(h); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B)(ii); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(d)(2)(C); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly-traded corporations), 18 USC 1514(c)(2)(C); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(A)(iii) and (B); ACCR of 2009 (U.S. Stimulus Law), P.L. 111-5, Section 1553(b)(2)(C) and (b)(3); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012(b)(3)(C) and (4)(D)(iii);

Dodd Frank (U.S. financial services) sec. 748(h)(1)(C), 922(h)(1)(C) and sections 1057(C)(4)(B)(ii) and (D)(ii)(III),

**17. Transfer Option.** It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

**Best Practices:** AfDB Whistleblowing and Complaints Handling Policy, section 6.5.5; UN SGB/2005/21, Section 6.1; United Nations Population Fund (UNFPA) "Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding Activity," para. 26; WFP Executive Circular ED2008/003, para. 22; The United Nations Children's Fund (UNICEF) Whistleblower Protection Policy, para. 23; OAS Model Law, Article 18; PIDA (S. Afr.), section 4(3); ACA (Korea), Article 33; WPA (U.S. federal government), 5 USC 3352; Serbian WPA, Art. 2, def. 7, Art. 28; South Africa PIDA, sec. 4(3); Liberia EO, sec. 11(f); Malaysian WPA, Sec. 19; Slovenia Anticorruption Act, Art. 25(4); Zambia PIDA, secs. 13(4)(c), 13(5), 47, 48, 49(3-4); Albania WPA, Article 18.3.

**18. Personal Accountability for Reprisals.** To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. The OAS Model Law even extends liability to those who fail in bad faith to provide whistleblower protection. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the U.S. in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

**Best Practices:** UN SGB/2005/21, section 7; UNFPA "Protection against Retaliation..." para. 29; UNICEF Whistleblower Protection Policy, para. 26; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.4, 6.9.2; World Bank Staff Rule 8.01, sec. 2.01(a); OAS Model Law, Articles 12,13 41-46; NZ PDA, section 17; Aus. PIDA, Prov. 14, 19; Irish PDA, Sec. 13-15; ACA (Korea), Article 32(8); Article 32(8); Hungary, Criminal code Article 257, "Persecution of a conveyor of an Announcement of Public Concern"; Public Interest Disclosure Act, No. 108, section 32; Uganda WPA, sections VI.16 and 18; WPA (U.S. federal government) 5 USC 1215; FRSA (U.S. railroad workers)

49 USC 20109(e)(3); NTSSA (U.S. public transportation) 6 USC 1142(d)(3); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly-traded corporations), 18 USC 1513(e); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(C); Bosnia WPA, Art. 12; Irish PDA, sec. 13; Jam. PDA, section 23; Serbian WPA, Art. 37, 39; Malaysian WPA, Sec. 16; Uganda WPA, sec. 16; Zambia PIDA, secs 42(1); 46(2), 50; OASD Staff Rule, sec. (b)(vi); Albania WPA, Article 23.

Some Multilateral Development Banks have created hybrid systems of accountability that indirectly protect whistleblowers from harassment by bank contractors. The banks' policies are to apply sanctions or even stop doing business with contractors who engage in whistleblower retaliation. AfDB Whistleblowing and Complaints Handling Policy, sections 6.2 and 6.3; ADB Administrative Order No. 2.10, section 8.5; Inter-American Development Bank Staff Rule No. PE-328, section 10.3 & 11.1; Aus. PIDA, sec. 23; Liberia EO, sec. 11(b)..

#### V. MAKING A DIFFERENCE

Whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public – positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

**19. Credible Corrective Action Process.** Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organization's website.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for Intergovernmental Organizations is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

**Best Practices:** ACA, (Korea), Articles 30, 36; Aus. PIDA, Prov. 43-54; Irish PDA, Schedule 3, Sec. 18; NZ PDA section 15; PSA (Can.), section 28.14(1) (1990); Japan WPA, Section 9 (2004); Slovenia Anti-Corruption Act, Articles 23 and 24; WPA (U.S. federal government), 5 USC 1213; Inspector General Act of 1978 (U.S. federal government), 5 USC app.; False Claims Act, 31 USC 3729 (government contractors); FRSA (U.S. railroad workers) 49 USC 20109(j); NTSSA (U.S. public transportation) 6 USC 1142(i); STAA (U.S. corporate trucking industry) 49 USC 31105(i); aus. PIDA, sec. 9-12, 18-19;

Belgium WPA, Arts. 12, 14; Jam. PDA, section 18, 19, Third Schedule; Serbian WPA, Art. 14, 15, 18; Liberia EO Sec. 10; India WPA, sec. 5(8-9); Malaysia WPA, Secs. 12-13; Slovakia WPA, secs. 11-12; Zambia PIDA, sec. 58.

**20. Review.** The foregoing criteria are to evaluate whistleblower laws on paper. Unfortunately, due to ambiguities, reliance on bad faith officials for enforcement or cultural resistance, in many instances the new rights in practice might be traps that victimize the naïve. Every whistleblower law should include a formal review process that tracks how many whistleblowers use the new rights, whether they have proven effective empirically, and what changes should be enacted based on lessons learned.

**Best practices:** Aus. PIDA, secs. 21, 24; Irish PDA, sec. 2; Jam. PDA, Sec. 21, 27; Japan WPA, Supplemental Provisions, Art. 2

[1] Unfortunately, in practice this office is severely understaffed and underfunded.

## REPORT WASTE, FRAUD OR ILLEGALITY

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BOARD of SUPERVISORS



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July 30, 2018

File No. 180756

Lisa Gibson  
Environmental Review Officer  
Planning Department  
1650 Mission Street, Ste. 400  
San Francisco, CA 94103

Dear Ms. Gibson:

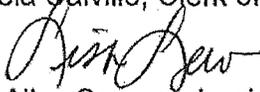
On July 17, 2018, Supervisor Ronen introduced the following proposed legislation:

**File No. 180756**

**Ordinance amending the Building, Housing, Fire, and Administrative Codes to authorize the Building and Fire Departments to require the installation of a new fire safety system or the improvement or upgrade of an existing system to current code requirements in a residential building of three or more dwelling units to remedy recurring or continuing fire hazards that substantially endanger the health and safety of the residents or the general public; amending the Rent Ordinance to prohibit landlords from increasing rents to cover the costs of compliance; affirming the Planning Department's determination under the California Environmental Quality Act; making findings under the California Health and Safety Code; and directing the Clerk of the Board to forward this Ordinance to the California Building Standards Commission upon final passage.**

This legislation is being transmitted to you for environmental review.

Angela Calvillo, Clerk of the Board

*for* By:  Alisa Somera, Legislative Deputy Director  
Rules Committee

Attachment

Joy Navarrete  
Digitally signed by Joy Navarrete  
DN: cn=Joy Navarrete, o=Planning,  
ou=Environmental Planning,  
email=joy.navarrete@sf.gov, c=US  
Date: 2018.08.01 16:42:07-0700

Not defined as a project under CEQA Guidelines Sections 15378 and 15060(c)(2) because it does not result in a direct or reasonably foreseeable physical change in the environment.

c: Joy Navarrete, Environmental Planning  
Laura Lynch, Environmental Planning

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. 554-5184  
Fax No. 554-5163  
TDD/TTY No. 554-5227

## MEMORANDUM

TO: Ben Rosenfield, City Controller, Office of the Controller  
LeeAnn Pelham, Executive Director, Ethics Commission  
George Gascón, District Attorney, Office of the District Attorney  
Jon Givner, Deputy City Attorney, Office of the City Attorney  
Micki Callahan, Director, Department of Human Resources

FROM:  Alisa Somera, Legislative Deputy Director  
Rules Committee

DATE: April 10, 2018

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Rules Committee has received the following proposed legislation, introduced by Supervisor Breed on April 3, 2018:

**File No. 180317**

**Ordinance amending the Campaign and Governmental Conduct Code to provide additional retaliation protections for whistleblowers, establish retaliation protections for City contractors, increase the remedies available for whistleblowers who have suffered retaliation, and establish greater confidentiality protections for whistleblowers' identities.**

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: [alisa.somera@sfgov.org](mailto:alisa.somera@sfgov.org).

c: Todd Rydstrom, Office of the Controller  
Kyle Kundert, Ethics Commission  
Cristine Soto DeBerry, Office of the District Attorney  
Maxwell Szabo, Office of the District Attorney  
Susan Gard, Department of Human Resources  
Carol Isen, Department of Human Resources

Print Form

RECEIVED  
4/3/2018 @ 6:05pm  
AS

# Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp  
or meeting date

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor [ ] inquiries"
- 5. City Attorney Request.
- 6. Call File No. [ ] from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No. [ ]
- 9. Reactivate File No. [ ]
- 10. Question(s) submitted for Mayoral Appearance before the BOS on [ ]

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

**Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.**

Sponsor(s):

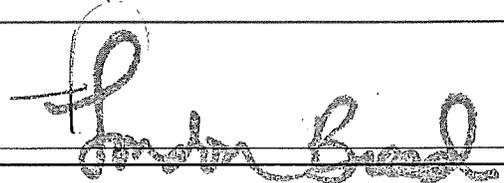
Breed

Subject:

Campaign and Governmental Conduct Code - Expanding Whistleblower Protections

The text is listed:

Attached



Signature of Sponsoring Supervisor:

[ ]

For Clerk's Use Only

