REPORT ON THE

WORLD BANK'S

WHISTLEBLOWER PROCEDURES

Prof. Robert Vaughn

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Executive Summary

In recent years the Bank has modified its internal grievance system creating the present Conflict Resolution System. The Bank has also addressed issues regarding internal control and audit as well as issues regarding the investigation and sanctioning of fraud and corruption. In each of these efforts, the Bank drew upon outside consultants. The Bank is now examining its internal system for receipt and evaluation of disclosures regarding fraud, corruption and misconduct and for resolution of claims of retaliation for these disclosures. The Bank has engaged a consultant to review the Bank's standards and procedures regarding "whistleblowers" and to recommend changes.

The Report identifies three issues regarding the Bank's whistleblower procedures. First, the Bank's definition of whistleblower demonstrates the need to answer unambiguously a series of questions that define who is a whistleblower. Second, the definition of retaliation is broader than the protections provided. The centrality of the concept of retaliation to the protections provided by the Bank counsels changes regarding the determination of retaliation. Third, unlike most institutions, the Bank is not subject to a particular legal system. This isolation from any particular body of law excludes both eternal receipt and evaluation of disclosures of misconduct and external determination of claims of retaliation. This isolation hinders the development of standards, weakens the Bank's whistleblower system, and affects the credibility of Bank procedures. The Bank, however, has available to it procedures analogous to external review.

The recommendations of the report address these three issues. Some recommendations seek clarification of existing standards and procedures while others propose changes in them. Some recommendations include options regarding implementation of the recommendation. In addition, the report contains some comments, identifying topics regarding which the report makes no recommendations.

Regarding the definition of whistleblower, the report recommends clarification of the inclusion of temporary employees, consultants, and local staff within the definition. The definition should also encompass former employees, those employees mistakenly identified as whistleblowers, and employees who aid or assist a whistleblower. The report also recommends that the employees of contractors be included within the definition but recognizes that the Bank will need to use contractual provisions to protect them. The report concludes that the Bank should cover those disclosures protected by several whistleblower statutes, disclosures that pertain to– violations of law, rule or regulation, abuse of authority, gross waste of funds, gross mismanagement, or a substantial and specific danger to public health and safety. Adoption of this recommendation will include most of the disclosures now protected by the Bank's standards

as well as some disclosures not now protected, but will exclude some disclosures now arguably protected.

Regarding the definition of whistleblower, the report advises against continuation of the obligation of staff and managers to make certain disclosures to management or to the Department of Institutional Integrity. This recommendation permits rather than requires disclosures and broadens the persons within the Bank to whom protected disclosures may be made. In these circumstances, the report proposes strengthening the Ombudsman and the Department of Institutional Integrity. Each avenue for receipt of disclosures should be evaluated by a common set of criteria and the report suggests some of these criteria. In those rare instances where a disclosure contains a credible allegation of serious misconduct that may implicate senior management of the Bank, the Bank should consider the use of outside evaluators.

Regarding the definition of whistleblower, the report recommends that the good faith standard for disclosure should unambiguously exclude consideration of the motives of a whistleblower. The Bank should emphasize to staff that its regulations also protect refusals to participate in misconduct.

Regarding retaliation, the Bank should set out the character of retaliatory actions in detail and should adopt a standard of proof that uses the "contributing factor" standard for the proof of retaliation, which if satisfied, places the burden on the Bank of establishing by "clear and convincing" evidence that the involved officials "would" have taken the same action absent the protected disclosures. These standards of proof carry with them certain well established principles in their application.

Regarding retaliation, staff members should be able to adjudicate any claim of retaliation for making protected disclosures or for refusing to participate in misconduct. The report presents four options to implement this recommendation. In addition, the Bank should ensure that staff members can efficiently adjudicate claims regarding a "pattern and practice" of retaliation. The Bank should advise staff when Bank managers are disciplined for retaliation.

Regarding issues of institutional design raised by the Bank's isolation from any legal system, the Bank should consider procedures analogous to those external disclosures protected under most whistleblower provisions. The report proposes three alternatives that move increasingly from the interior of the Bank to committees of the Board, to inspection panels and to sources external to the Bank, which would be designated by the Bank. The report suggests a number of ways, consistent with whistleblower protection laws, that disclosures beyond the management of the Bank could be circumscribed.

Regarding issues of institutional designed raised by the Bank's isolation from any legal system, the Bank should consider procedures analogous to external adjudication of claims of retaliation. Staff members should initially be able to adjudicate claims in a way binding on the Bank. The report suggests three options for doing so, including binding arbitration. Analogies to

external adjudication counsel for changes in the procedures and composition of the Appeals Committee. The report proposes a remedial principle that remedies should make a whistleblower whole and describes the remedies incorporated. To protect the adjudicatory process, the Bank should pursue claims of retaliation for using the Conflict Resolution System and for retaliation or intimidation of witnesses.

Introduction

Consultant's Remarks. The Legal Vice Presidency of the World Bank commissioned me to produce this report on the Bank's whistleblower procedures. These whistleblower procedures include those addressing the receipt of disclosures of misconduct surrounding the Bank's programs and those considering complaints that persons have suffered retaliation connected to the disclosure of misconduct. The assistance of the Legal Vice Presidency and the cooperation of management and staff enabled me to complete this report. Any factual errors in the report, however, are my responsibility. I am pleased to have been asked to conduct this project because of its importance.

International organizations increasingly confront challenges to their legitimacy and some of those organizations that have not addressed the issues of transparency, including whistleblower protection, have suffered from scandals that have weakened their reputations and reduced their effectiveness. It is commendable that the World Bank is willing to accept the challenges of self evaluation and of change.

This report represents one of several evaluations that the Bank has undertaken or supported considering some of the issues raised in the report. Because the procedures of the Bank are not part of any particular legal system and the Bank enjoys significant immunities from national laws, the World Bank, like other international organizations, must invent its own system of protection. Thus, international organizations are faced with a task unlike that confronting most government agencies and private corporations. This need to create a system apart from any specific body of law explains the detail in this report. The World Bank, as one of the most important international organizations, will likely set the standards that not only will guide the Bank but also will influence other international organizations.

Format of the Report. The report identifies several issues and makes recommendations regarding the Bank's whistleblower procedures. These recommendations rest upon standards and practices followed under a variety of whistleblower laws and regulations. A comment follows each recommendation explaining and justifying it. Sometimes a recommendation will contain several options to implement it. In these instances, the report discusses each of the options and presents arguments regarding each. In some instances, the consultant presents a conclusion regarding these options. Some recommendations can immediately be implemented without significant change in the existing system. The report also identifies some issues for which no specific recommendations are made. At a future point these issues may require additional inquiry. Annex A describes the methodology of the report and the background of the consultant.

Some of the recommendations propose the clarification of standards or procedures. In some instances, the consultant believes that a recommendation reflects the position most likely taken by the Bank's regulations. Because employees and others can not look to other bodies of law for guidance and because many of these standards or procedures are important to confidence in the Bank's system of whistleblower protection, these recommendations deserve the same attention as ones that more unambiguously require changes in standards or procedures.

Importance of an Exemplary Whistleblower System within the Bank. The Report adopts a high standard for the Bank's system. The standard applied is not one of "adequacy" but of one that complies with "best practices" and establishes the standards for international institutions like the Bank. A number of reasons support this standard. First, the Bank's mission and its place in international development counsels for the highest standards. Such standards assure stakeholders and critics alike of the Bank's abhorrence of corruption and misconduct. Such standards create perceptions in those covered by the system that are crucial to its success. Such standards reinforce the efforts to encourage recipient countries to adopt laws and regulations ensuring transparency and the rule of law, including protection of whistleblowers. In these circumstances, the Bank must lead by example by setting the highest standards for whistleblower systems.

Second, whistleblower procedures can be seen as important to management efficiency. The information provided by whistleblowers ensure the ability of management to respond to complaints and identify problems before they become detrimental to the mission of the Bank and to its reputation.

Whistleblower procedures can be seen as an important management tool in another way. Whistleblower procedures credible to those covered by them permit the management of the Bank to manage disclosures to provide the maximum benefit to the Bank. If procedures are not viewed as credible, management will find it much more difficult to predict when and to whom disclosures will be made and may be deprived of the opportunity to address problems in their infancy. The consultant found within the Bank a willingness to evaluate the Bank's procedures and a commitment to making the Bank's system exemplary. Because that standard is a high one, no recommendation in the report should be considered to be an implicit (or explicit) finding of any impropriety in the Bank.

The Bank's program exists in a climate where whistleblower protection is wide spread and extensive. A number of federal statutes in the United States provide broad protections to federal employees and to private sector employees. The best known examples include the Whistleblower Protection Act of 1989, applying to federal employees, and the whistleblower provision of the Sarbanes-Oxley Act, applying to millions of corporate employees. In addition, most states in the U.S. have statutes, often patterned on the Whistleblower Protection Act or its predecessor, covering both public and private sector employees.

The Whistleblower Protection Act revised the whistleblower protections of the Civil Service Reform Act of 1978. The revision rested on experience with the Reform Act and

addressed weaknesses in its administration and interpretation. The Whistleblower Protection Act confirmed and slightly modified the definition of whistleblower, eliminated motive as factor in determining protection, adopted principles to involve whistleblowers in the assessment of allegations of misconduct, significantly altered the standards of proof regarding retaliation, allowed whistleblowers to bring previously excluded claims of retaliation to administrative adjudication, provided interim relief, permitted referral of some allegations of agency misconduct to Congressional oversight committees, the President, or the Comptroller General in some instances without an agency response, and increased the remedies available to successful whistleblowers.

The whistleblower provision of the Sarbanes-Oxley Act is the first comprehensive statute protecting corporate employees in the United States and it likely has extraterritorial effect. Moreover, this provision is becoming a standard for organizations not covered by it. This provision protects disclosures of information regarding not only accounting and financial manipulation, but also, in some circumstances, other types of fraudulent schemes; health and safety violations; environmental misconduct; product risks; consumer fraud; false claims against the government; disregard of statutes requiring disclosure of information to federal regulatory agencies; violations of anti-discrimination laws; violations of rules and statutes protective of labor; conspiracies to violate the antitrust laws; bribery of public officials, including foreign officials; and human rights abuses. The whistleblower provision covers applicants, employees, former employees, and employees of contractors and other representatives of a company. Internal disclosures are protected as are disclosures to regulatory and law enforcement agencies and to members and committees of Congress. The provision defines retaliation broadly and permits adjudication of claims of retaliation before administrative law judges in the Department of Labor and in some instances before United States district courts. It creates broad remedies including litigation expenses, reinstatement, back pay and compensatory damages.

Internationally, many nations, including such diverse countries as Great Britain and Japan, have whistleblower statues. Most countries with anti-corruption laws include a whistleblower provision. In some countries that reject the doctrine of at-will employment applicable in the United States, whistleblowers are protected by the requirement that dismissal and often other personnel actions occur only for "good cause." The European Union's Criminal and Civil Conventions Against Corruption as well as the Inter-American Convention Against Corruption and the United Nations Convention Against Corruption contain provisions protecting whistleblowers.

Many of these provisions, particularly some of the best known, provide useful comparisons and suggest modifications that can be made in the Bank's system. This report draws on some of these examples in its recommendations.

Major Issues Identified With the Bank's System.. First, the Bank's definition of "whistleblowing" or "whistleblower" is ambiguous and unclear. Lack of clarity discourages disclosures by employees and hinders managers in addressing personnel and performance

problems. Several questions must be unambiguously answered in defining a whistleblower. Among these questions are: What persons connected with the Bank are covered by the system? What disclosures are covered by the system? To whom may disclosures be made? What standard applies to the decision of the whistleblower to make a particular disclosure? What, if any, disclosures are prohibited or limited? Is refusal to follow a directive believed to be illegal or improper also covered? At one point Bank guidelines seem to define a whistleblower in terms of the answers to these questions, in another place the definition of whistleblower can be interpreted to require that a staff member must face retaliation to be a whistleblower.

Second, the concept of retaliation for protected disclosures is broader than many of the protections for retaliation. The definition contained in website of the Office of Ethics and Business Conduct states "there is range of comments and actions which can be perceived as retaliation" and gives the following examples: critical comments by a manager that an employee took concerns outside the Department, retracting previous praise of a employee, denigrating an employee and marginalizing or isolating staff.

However, more formal procedures for addressing claims of retaliation, the Appeals Committee and the Administrative Tribunal, apply respectively only to "administrative decisions" and to "nonobservance of the contract of employment or terms of appointment of such staff member." These terms, contract of employment or terms of appointment, include "all pertinent regulations and rules." This language is broad enough to encompass any violation of Bank rules protecting whistleblower but may not include advice or guidance about these rules. Thus, the exact character of retaliation covered is unclear. In addition, because the Administrative Tribunal requires, in most instances, that an applicant exhaust other remedies within the Bank, the scope of jurisdiction over appeals before the Appeals Tribunal may limit redress for retaliation.

There are several options for eliminating this difference in the scope of stated protections and the techniques of formal redress. The concept of retaliation is central to the Bank's whistleblower protection procedures and the importance of the concept suggests other changes in the procedures for determining retaliation.

Third, unlike most institutions, the Bank is not subject to a particular legal system. Because of its immunity for employment related actions, no specific body of domestic or international law applies to the Bank and no external authority reviews or adjudicates claims based on its whistleblower provision. Thus, no external authority routinely receives and evaluates allegations of corruption or misconduct within the Bank. No external authority reviews or adjudicates decisions regarding claims of retaliation.

Many whistleblower provisions use the possibility of external disclosure to foster the development of internal schemes to encourage employees to bring forward information. Likewise, many whistleblower provisions use the possibility of external adjudication to police institutional decisions regarding retaliation. In this setting procedures that may be acceptable

internal grievance provisions within most organizations can be viewed as inadequate to accomplish the goals of whistleblower laws that operate within particular legal systems.

Part One: The Meaning of "Whistleblower"

"Whistleblower" can be seen as a term inviting a philosophical or policy discussion. In the context of rules regarding disclosure and redress of instances of retaliation for those disclosures, whistleblower has a legal meaning based upon the ways in which those rules answer a number of questions. Philosophical and policy considerations may be involved in the answers but in its creation a whistleblower system answers some of the more basic of these, including the role of individual employees in disclosing misconduct and the obligations of the institution to protect those who do.

What Persons Connected with the Bank Are Covered by the System? Bank regulations seem to encompass temporary employees, consultants and local staff. In addition, materials relating to the Conflict Resolution System in most instances indicate that temporary employees, consultants and local staff may use the system. In describing institutional protections for whistleblowers, the Office of Ethics and Business Conduct describes the protections as applicable to "an individual."

The Bank's standards also are unclear regarding whether whistleblower protections apply to persons otherwise encompassed within the personnel system. For example, is a person mistakenly identified as a whistleblower protected? Are persons who assist a whistleblower in making a disclosure also protected?

Although the regulations do not address former employees, persons who have claims regarding their dismissals or other actions taken by the Bank against them while they were employees logically fall under the regulations. Other former employees do not. Likewise, the regulations less clearly cover employees of Bank contractors.

Recent whistleblower provisions illustrate the inclusion of employees of a company mistakenly identified as whistleblowers or who have aided and assisted whistleblowers and former employees. This coverage is seen as important to the protection of employees who make disclosures. For example, the Sarbanes-Oxley Act has, in the light of other provisions, been interpreted to include these categories of employees. If an employer can fire coworkers of a whistleblower, an employer can discourage disclosures by showing that retaliation will follow if any employee complains. Likewise, whistleblowers are most vulnerable when they are isolated and protecting those who aid, assist or advice them can strengthen the protection of those employees who make disclosures.

Coverage of former employees protects them from retaliation for disclosures made as employees. Retaliation against former employees could take a number of forms including

"blacklisting" such as discouraging the hiring of the employee by other organizations or defamation of the employee.

The Sarbanes Oxley Act covers the employees of contractors of companies. This coverage rests partly on the rationale that these employees are a good source of information about violations of the relevant law by officials of covered companies and that contractors might act on orders of companies to silence whistleblowers or do so on their own to curry favor with these companies.

Recommendation One: The Bank should confirm the inclusion of temporary employees, consultants and local staff. The Bank should include former employees within its protection. The Bank should articulate protection for persons mistakenly identified as whistleblowers and those persons who aid or assist them. The Bank should include the employees of contractors within the definition of those persons protected by the Bank

Comment: Proof of retaliation is more complicated, regarding consultants and other contract employees of the Bank because such persons have appointments that expire by their own terms. Establishing that failure to renew constitutes retaliation is more difficult and the character of the remedies provided more challenging but the existing system appears to encompass this group of persons.

Inclusion of persons mistakenly identified as whistleblowers or those who aid or assist them also complicates proof. Such persons will confront difficulties of proof that will make the establishment of a claim more difficult but the arguments for including them are strong ones.

Inclusion of former employees raise some additional issues. Logically, former employees could seek redress for retaliation linked either to disclosures made while employees or to disclosures made as former employees. For example, former employees could possess information acquired as employees but not disclosed until after they had left the Bank. Former employees would have to have access to the conflict resolution mechanisms available to employees. Remedies would of necessity be more limited because former employees are not contending that they should be reinstated or that they receive back pay. Still, some remedies, such as clarification of a record or retraction of statements, might be available.

Bank regulations already prohibit a staff member from retaliating against "any person" who provides information of serious conduct. If this language includes a contractor or its employees, it subjects staff members to discipline. It is less clear what remedies would be available to a contractor or its employees. The regulations understandably do not address claims of retaliation by a contractor against its employees.

Inclusion of claims against a contractor by persons working for contractors creates difficulties because such persons have no direct connection with the Bank and much of the

Conflict Resolution System seems ill designed to accept allegations of misconduct or claims of retaliation. Moreover, the Bank may be poorly placed to provide meaningful remedies to them. Such employees, however, are likely to posses important information about corruption within the Bank or within the programs of the Bank.

Unlike companies covered by Sarbanes-Oxley, the Bank can not rely on an external system to protect these employees of its contractors. Therefore, the Bank will need to structure its own system. The Bank could include whistleblower protection provisions for a contractor's employees into the contract with that contractor. These contract provisions should define to whom disclosures could be made. Disclosures to the contractor should be protected but not required and avenues of disclosure to the Bank should also be stipulated. The avenues of disclosure to the Bank should consider that disclosures might implicate staff of the Bank involved in the letting or administration of the contract. These contractual provisions could include a definition of whistleblower, the procedures for receiving and resolving complaints of retaliation and the remedies that will be made available as part of the contract.

The Bank has used contractual provisions to help detect and sanction fraud or corruption. Perhaps protection of these employees of contractors could be limited to disclosures regarding fraud and corruption in the performance of the contract or fraud and corruption by staff of the Bank connected with or relating to the contract. As in other contexts, the Bank could regularly review its loan agreements, procurement guidelines and standard contracts to insert provisions designed to provide for disclosures from employees of contractors and to protect them from retaliation, such as defining whistleblower protections for such employees, requiring document retention and giving the Bank access to documents and personnel materials, and defining procedures for review and redress of claims of retaliation.

Some persons in the Bank have expressed concerns that involvement by the Bank in the employment relationship between the contractor and its employees might affect the Bank's immunity. The Bank may have confronted similar issues regarding its use of contractual provisions in other contexts.

What Disclosures Are Covered? The Bank requires every staff member to disclose "suspected fraud or corruption in Bank-Group financed projects or in the administration of Bank Group business" Staff members are "encouraged to report all other forms of misconduct" but are "not required to do so." By contrast, managers are required to report all allegations of misconduct "suspected or received" as well as corruption and fraud.

Misconduct is a broad term described by examples. These examples describe misconduct in terms of failure to observe "health and safety regulations, personnel information policies, public information policies, information security policies, or procurement policies" unauthorized use of staff or equipment, "absence from duty without justifiable cause", imprudent professional conduct, "failure to know, and observe, the legal, policy, budgetary, and administrative standards and restrictions imposed by the Bank Group," violations of conflicts of interest regulations,

misuse of Bank Group funds and "abuse of position in the Bank for personal gain for oneself or another," harassment or wrongful discrimination of various types, and "failure to meet personal legal obligations as required by Bank Group policies." At another point, in the description of the scope of protection against retaliation applies to raising "concerns in the workplace." The Bank's description of whistleblowers can also be interpreted to require retaliation before a person making a disclosure is considered a whistleblower.

On the one hand, staff members may be confused by these definitions and unsure of what disclosures may be protected under the Bank's policy. On the other hand, managers may believe that a staff member making any allegation regarding the workplace is entitled to protection. The definition of protected disclosures vary among whistleblower provisions. Some statutes limit disclosures to violations of laws or regulations, anti-corruption provisions sometimes limit disclosures to violations of specific anti-corruption provisions. Other statutes are broader in scope. The Whistleblower Protection Act of 1989 covers disclosures regarding violations of law, rule or regulation, abuse of authority, gross mismanagement, gross waste of funds or a substantial and specific danger to public health and safety. The whistleblower provision of the Sarbanes-Oxley Act covers disclosures of a broad range of corporate misconduct, extending beyond accounting or financial manipulation. Other anti-corruption provisions, such as the Model Statute implementing the Inter-American Convention Against Corruption, cover a range of disclosures similar to the Whistleblower Protection Act on the grounds that these categories regularly contribute to corruption or follow from it. Annex B describes alternatives to this definition of protected disclosures.

Recommendation Two: The Bank should adopt as the standard for protected disclosures that contained in the Whistleblower Protection Act of 1989 and similar statutes. Protected disclosures would include those that address violations of law, rule or regulation, abuse of authority, gross waste of funds, gross mismanagement, or a substantial and specific danger to public health and safety.

Comment: This recommendation adopts this definition as preferable to other alternatives. First, this definition is one of the more widely adopted. It is reflected not only in a number of statutes in the United States but also in interpretations of international provisions and is reflected in the laws of other countries. Second, the definition extends beyond violations of law, or of specific statutes and broadly encompasses conduct that either supports or enables corruption. Third, this standard reduces disputes about the meaning of more limited terms by addressing the conduct that enables corruption in a variety of ways.

This definition would cover many disclosures now encompassed by the Bank's policy. For example, any violation of a Bank regulation would be protected, including such matters as conflicts of interest, harassment, corruption and fraud, and misuse of staff or property. Under whistleblower laws, the term, regulation, has been interpreted to include other statements of policy or practice that serve the function of regulations in establishing standards of behavior. The Bank will need to give some attention to the term *law* within the phrase, law, rule or regulation,

because the Bank is not subject, except by its consent, to the law of any jurisdiction. The Bank, however, could incorporate into its regulations the provisions of laws addressing topics of concern to the Bank. In addition, any disclosure regarding the abuse of authority would be protected.

This definition of protected disclosure, however, will exclude some disclosures arguably now included in the various conceptions of a whistleblower contained in Bank statements. For example, only a gross waste of funds or gross mismanagement would be covered. The language of the Whistleblower Protection Act seems designed to exclude trivial concerns about waste or mismanagement. Unlike violations of law, rule, or regulation or abuse of authority, in which conduct can be measured against established standards, waste of funds and mismanagement are much more matters of judgment against less well established standards. Thus, a disclosure regarding "any concern" in the workplace would likely not be protected.

The requirement of a substantial and specific danger to public health or safety would not exclude disclosures regarding the violations of established health and safety regulations for such disclosures would fall under disclosures of violations of law, rule or regulation. Other disclosures regarding dangers to public health and safety would have to meet the threshold of a substantial and specific danger.

Recommendation Three: The Bank should not continue the duty of staff to disclose information regarding fraud and corruption. The Bank should not continue the duty of managers to disclose all allegations of misconduct that reach them.

Comment: The obligation to disclose emphasizes the Bank's condemnation of fraud and corruption. Likewise, the requirement can been viewed as protecting staff members and managers who make such disclosures because they can be perceived as simply doing what the management of the Bank requires. Managerial accountability also supports the imposition of this duty. Because the Bank owes obligations to a variety of stakeholders, the fiduciary duties of staff and managers justifies imposition of an obligation to disclose. Different cultural conceptions of the appropriateness of individual reporting on the activities of others suggests the need for a clear statement of an obligation to do so in circumstances defined by the Bank. Finally, the obligation to disclose placed on mangers involves persons outside of affected management in the assessment and response to identified misconduct.

In addition, the obligation of managers to disclose misconduct would aid in the discipline of managers for retaliation against whistleblowers. Such retaliation would constitute misconduct under the Bank's regulations. A failure of a manager to disclose knowledge of such retaliation would subject that manager to discipline as well.

For staff and managers, however, the requirement can be a "double-edged sword." First, the definitions of fraud and corruption can encompass a variety of conduct and the imposition of an obligation would suggest the need for more precise definitions. Second, unless staff and

managers are convinced of the effectiveness of protections against retaliation, they confront a difficult choice. If the obligation is any more than a hortatory statement, staff and managers may be punished for a failure to disclose or perhaps for an "untimely" disclosure. On the one hand, a staff member skeptical of protections against retaliation takes a risk in doing so. On the other hand, the staff member risks discipline for not doing so. Particularly in the circumstances of an untimely disclosure, the obligation can be used not to protect whistleblowers but to punish them.

Third, managers have an obligation to report "any allegation" of misconduct received or suspected by them. Compliance with the obligation would require a manager to report a large number of allegations, including frivolous ones. Such an obligation leaves the manager with no screening and evaluation function and places this burden on INT. With an emphasis on a proactive and preventive role for INT in dealing with corruption, this burden may consume investigative resources better addressed elsewhere

Fourth, because this language requires, in the case of staff, a disclosure to managers or the Department of Institutional Integrity and, in the case of managers, a disclosure to INT, the obligation to disclose could be seen as depriving staff and managers of other ways of reporting. For example, a staff member or a manager could contact the ombudsman and rely upon the ombudsman to forward the disclosure to INT. The ombudsman would in effect evaluate the allegation and could forward ones suggesting the need for investigation while protecting the identity of the staff member or manager. The Ombudsman could thus act to screen the frivolous or insubstantial allegation of misconduct.

Finally, this obligation suggests different standards for some protected disclosures than for others. This approach does not seem consistent with the Bank's adoption of a single standard for disclosure.

It appears that in practice, staff members do use avenues of disclosure other than those described in the regulation. If this is the case, the character of the obligation needs to be clarified.

Note: The term misconduct as referred to in the remainder of the report encompasses misconduct as currently defined by the Bank. If, however, the Bank were to adopt Recommendation Two, that term would include the definition contained in that recommendation.

To Whom May Disclosures Be Made? The Bank's guidance suggests that staff have several avenues through which allegations of misconduct may be reported. These include a staff member's direct manager or in some circumstances another manager in the staff member's department, the Office of the Ombudsman (Ombudsman), the Ethics Office, including the hotline of the Ethics Office, the Department of Institutional Integrity, including a hotline operated by a contractor for the INT.

Thus, a staff member has a variety of options for disclosing misconduct. These options vary in some significant ways. For example, the guarantee of confidentiality offered by the Ethics Office appears more limited than the guarantee of the Ombudsman. The hotlines permit anonymity and promise confidentiality within some limits. The Ombudsman has some power to acquire Bank documents not shared by some other offices. Mediation may not be used when a staff member believes that misconduct has occurred but might be used when a staff member has confidence that management may be able to allay concerns or to eliminate a less serious problem. According to the Bank's regulations, "cases of alleged corruption or misconduct are inappropriate" for mediation. INT possesses investigative powers not held by other offices. The Ombudsman and the Ethics Office are more likely sources of guidance regarding the misconduct, if any, suggested by the disclosure as well as advice regarding how a staff member should proceed.

It is difficult with the system as a whole to determine what happens to the allegations contained in the disclosures, how the staff member is involved in the investigation of the allegations and whether the staff member is informed of any resolution. Among the offices, INT has the most articulated guidelines on these issues. Given these differences, the Bank's documents give limited guidance as to how a staff member should choose among these options.

Bank regulations do not specifically address other offices and entities within the Bank that might receive disclosures. For example, the Internal Audit Department might be an office to which some allegations of misconduct might be made. It is also conceivable that a staff member might appear before an inspection panel to present disclosures. It would seem odd that disclosures protected if made to other offices would not be protected in these instances as well. In addition, the Bank's procedures make no provision for the disclosure of misconduct to the Executive Directors or to committees, such as the Audit Committee or the Personnel Committee, or to the Dean of the Board.

As discussed above, the regulations could be interpreted to require staff to disclose allegations of fraud or corruption either to a manager or to INT. If so, the regulations limit the options available to staff. Managers would be limited regarding not only disclosures of fraud or corruption and but also of misconduct. Although almost all whistleblower provisions protect "internal" disclosures to management, few whistleblower provisions require disclosure to management prior to making disclosures to others. Although the Bank's statements can be interpreted to permit disclosures to other offices before a disclosure to one's manager or to INT, the regulations also can be interpreted to require disclosure to one's manager or INT.

Recommendation Four: The Bank should make clear that a staff member does not have to disclose suspected fraud or corruption to a manager or to INT and that other disclosures will be protected. The Bank should make clear that a manager does not have to disclose receipt or suspicions of fraud or corruption or misconduct to INT and that other disclosures are protected.

Option One: The Bank should abandon the obligation on staff and managers to make

disclosures as contained in Staff Rule 8.01. Option one would require the adoption of Recommendation Three. Recommendation Four is a clarification of the implications of that recommendation.

Option Two: The Bank should continue to require disclosures as contained in Staff Rule 8.01 but permit the disclosures to be made to a number of sources within the Bank. This option assumes that the Bank rejects Recommendation Three.

Comment: The Bank's procedures arguably do not require disclosures to these offices prior to disclosures to others but the language suggesting certain entities must first be contacted should be clarified to remove any doubt on this point. If the Bank interprets its rule to require these disclosures, the report presents two options. First, the Bank could eliminate the obligation to report. That elimination would permit the staff member or manager to choose whether to disclose and what avenue of disclosure to follow. The reasons for and against the elimination of this obligation are canvassed above.

The argument for a elimination of the requirement regarding staff members seems, at first glance, to be stronger than that regarding managers. This impression rests on a sense of a greater obligation of managers. Both staff and managers, however, could face a similar dilemma regarding the risks created by such an obligation. Moreover, the distinction between fraud and corruption on the one hand and misconduct on the other hand is not clear and some, perhaps many, allegations of fraud and corruption would also fall under the definition of misconduct. Thus, the distinction between the duties of staff and managers is less well defined than it might appear.

If the Bank rejects Recommendation Three and continues the obligation to disclose, then the Bank should permit those disclosures through other avenues as well. An interpretation that requires disclosures by staff members and managers regarding fraud and corruption will tend to centralize all these disclosures in INT. The obligation on managers to disclose will bring many, perhaps most, allegations of misconduct to INT. Such obligations reduce significantly the importance of the other avenues for disclosures and emphasizes Recommendation Seven regarding the independence of INT. In theory, the other avenues of disclosure would only receive disclosures by staff regarding misconduct. If the Bank rejects Recommendation Three but elects option two, an employee would have an obligation to disclose but could do to through any of the avenues set out in the Conflict Resolution System. If this is so, the Office of the Ombudsman assumes greater importance and this importance further emphasizes Recommendation Six regarding enhancement of that office.

Recommendation Five: The Bank should protect disclosures to any person or entity within the Bank with responsibility for oversight, implementation or review of an activity subject to a protected disclosure

Comment: This recommendation authorizes disclosures to a number of management

officials within the Bank as long as their duties are connected with the activity subject to a protected disclosure. This recommendation may in some circumstances permit disclosures to management officials in another unit as long as they have some responsibility that connects them to the activity. This recommendation provides another management alternative when a staff member or manager may be concerned that the reported misconduct extends upward in the chain of command of that person's unit. It permits disclosures to management officials outside of the chain of command. For example, the Internal Audit Department would thus become a unit to which a protected disclosure could be made. This recommendation does not encompass entities not part of the management of the Bank. The propriety of disclosures to inspection panels and to other officials within the Bank will be discussed in Part Three of this report. For comparison, the whistleblower provision of the Sarbanes-Oxley Act protects disclosures to any person "working for the employer who has the authority to investigate, discover or terminate misconduct."

Recommendation Six: The Bank should strengthen the authority of the Ombudsman.

Comment: In many countries the ombudsman is a familiar figure that plays a role in addressing misconduct in public and private institutions. Under the Sarbanes-Oxley Act some companies have created an ombudsman or similar offices to address allegations of misconduct. Prior to the Act, many companies used ombudsman to resolve a range of workplace disputes. The Ombudsman seems a logical office to evaluate disclosures, to seek comments from other offices, and to guide staff members to other avenues. The ability of the Ombusdman to engage other officials within the Bank, to acquire documents, and to guarantee confidentiality suggest that some attention be given to this office. The Ombusdman "may also act on his or her own initiative to address issues within the Ombudsman's prescribed jurisdiction."

Moreover, some office should be responsible for coordinating and evaluating the results of disclosures and to encourage Bank officials to address systemic problems. Traditionally, such functions have been the responsibility of an ombusdman. Some of these changes might be matters of encouragement and suggestion to staff while others might require conferring more formal responsibilities. With these responsibilities, the Ombudsman needs to be given security and access to perform them and to generate confidence among staff and management about the authority of the office.

The current regulations stress the conflict resolution aspects of the Office of the Ombudsman rather than its authority to pursue allegations of misconduct. Strengthening the Ombudsman in this regard provides a less formal method of dealing with allegations of misconduct. If so, the Ombudsman should be given broad access to records addressing potential misconduct. The present charge of the office addresses access to "records concerning staff." Another technique to strengthen the Office is suggested by INT's ability to contact the Audit Committee even though INT reports to the President of the Bank.

Another technique is suggested by the role of the Audit Committee in the replacement of the Auditor-General. The Audit Committee is an example of such an arrangement and the Bank

might decide that another committee of the Board might be preferable. An ombudsman is often given the authority to require management officials to report in writing regarding allegations that the ombudsman believes merit a response. Such authority in the Ombudsman should be made explicit. This enhancement of the Office of the Ombudsman in receiving and evaluating allegations of misconduct may create some conflict with the formal investigations by INT. For example, allegations regarding the same misconduct may reach the Ombudsman and INT independently through separate channels. Some coordination between the offices may be required but the variety of avenues of disclosure now provided by the Bank require a similar coordination.

Recommendation Seven: The Bank should strengthen the Department of Institutional Integrity.

Comment: INT plays a central role in investigating disclosures of misconduct and a crucial role in the Bank's anti-corruption efforts. The office has a professional staff familiar with both corruption investigations and investigations of workplace misconduct such as harassment. In addition, it may communicate with the Audit Committee of the Board. In this regard, the Bank has already taken steps to insure the independence of the Department.

The Department of Institutional Integrity most brings to mind inspectors general used by different government agencies and entities. The Congress of the United States has devoted considerable attention to the inspectors general in the federal government and the techniques developed in that context offer some suggestions for the Bank. Of course, the structure of the federal government and of the Bank differ but the principles involved have applicability .

There are several pertinent principles. First, inspectors general have broad authority to accomplish their tasks, including access to agency materials. Second, inspectors general can disclose the identity of a whistleblower only if is "unavoidable." Third, inspectors general have used hotlines as important sources of information and developed standards for them. Fourth, the head of an agency or a person next in rank can not "prevent or prohibit an inspector general from initiating, carrying out or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." Finally, management of an institution may not remove an inspector general without giving notice to some body responsible for oversight of the institution.

The Bank's organization and powers of the INT already adopt some of these principles. For example, INT has broad authority to carry out its mandate. It protects the confidentiality of whistleblowers. INT has a hotline (and also coordinates with the Office of Ethics and Business Conduct regarding its hotline) and outside evaluations of INT's hotline have found that it meets the standards for such hotlines. The final two principles are less clearly and completely incorporated in Bank regulations and practices. The final principle suggests some role of the Audit Committee or other committees of the Board.

Because INT also has an obligation to investigate allegations of retaliation as well as disclosures of misconduct, it also brings to mind specialized offices that consider retaliation against persons that have brought complaints to anti-corruption or public conduct commissions. In the federal government, it brings to mind the Office of Special Counsel, significantly modified by the Whistleblower Protection Act of 1989.

That revision adopted several principles applicable to the Office. First, with very limited exceptions, the Office of Special Counsel may not respond to any inquiry or provide any information about a person making a protected disclosure. Second, the Office of Special Counsel is required to advise whistleblowers regarding an investigation concerning complaints of retaliation by giving the whistleblower updates on an investigation and the Special Counsel has the duty to explain in writing the resolution of the complaint. The whistleblower also has the right to comment on any action based on the Special Counsel's conclusion that retaliation had occurred. Finally, the revision sought to insure that the Office would not be used to penalize whistleblowers who came to it with complaints.

These principles suggest different modifications than the principles applicable to inspectors general. For example, the protection of whistleblower confidentiality is greater with the Office of Special Counsel that with inspectors general. Considerable attention is paid to insuring that Office of Special Counsel will not be used to penalize whistleblowers, an attention not directed to the same issue with inspectors general.

This analysis also suggests some tension between responsibilities of the any investigative body like INT. The primary mission of inspectors general is pursuit of disclosures of wrongdoing rather than the protection of whistleblowers. Although the Office of Special Counsel may evaluate disclosures of wrongdoing, its primary mission is the protection of whistleblowers from retaliation. Although such duties are not necessarily incompatible, the tension between them requires conscious accommodation.

Recommendation Eight: Each avenue for the receipt of disclosures should be evaluated according to a common set of applicable criteria.

Comment: Under various whistleblower provisions a number of specialized bodies are responsible for receiving and responding to protected disclosures. In many countries the best known of these specialized bodies are anti-corruption commissions or public integrity boards. In the United States the best known are the Office of Special Counsel created by the federal Civil Service Reform Act , and inspectors general and similar offices in government agencies and private organizations.

A body of experience now suggests some criteria to evaluate offices, such as several of those in Bank, outside of management that receive and respond to protected disclosures. A person's knowledge of the response to a disclosure is particularly important in encouraging staff

members to disclose misconduct. In surveys of the federal civil service in the United States, employees give as the primary reason why they do not report misconduct, the belief that nothing will happen as a result of their disclosures. Fear of retaliation is the second most common reason for failing to disclose. The recently enacted whistleblower protection law of Japan includes a provision requiring notification of the whistleblower regarding the outcome of his or her disclosure. These examples and these studies suggest one important criterion: Does the office inform the whistleblower of the outcome of any inquiry into the allegations of misconduct?

Among other criteria are several previously mentioned. Under what conditions does the office guarantee confidentiality? Under what conditions can information regarding the whistleblower be shared with others? Is the person informed of the efforts undertaken by the office? Does the office have statistical information as well as commentaries about each of the allegations of misconduct received by the office and its resolution? Is there some established mechanism by which the office can routinely inform management of the Bank about systematic problems or general issues? What types of process does the office offer a staff member complaining of retaliation? What remedies are available through the office?

Recommendation Nine: The Bank should consider the use of evaluators external to the Bank regarding credible allegations of the most serious misconduct, such as fraud or corruption, that may implicate senior management of the Bank.

Comment: The Bank's regulations permit a preliminary inquiry regarding allegations of misconduct by the President or Vice-President to be conducted in some circumstances by "a person outside INT." This language is unclear but suggests the use of personnel of the Bank other than INT rather than an option to use evaluators external to the Bank. The regulation also seems to limit the circumstances in which a person outside INT may be used. The recommendation permits the use of evaluators external to the Bank in instances not covered by the current regulation.

Increasingly, after passage of the Sarbanes-Oxley Act, corporations have used law firms or outside investigators to evaluate credible allegations of serious misconduct that may implicate senior management of the corporation. In most corporations and in the Bank the likelihood of the need for such an evaluation may be small but the availability of this technique for addressing allegations reassures stakeholders and interested outside parties of the effectiveness of an institution and its commitment to addressing concerns regarding fraud and corruption when senior officials may be involved.

The benefits of such an alternative for addressing a few allegations of misconduct may in fact be greater for institutions that are not subject to external law. It be much better for such an organization to commission an external evaluation of alleged misconduct than to have an evaluation forced on it after a significant blow to its reputation. It would in fact be preferable to encourage internal disclosures that identify the problem and to resolve it before it becomes a public scandal.

There is limited precedent within the Bank for the use of third parties to acquire information. The precedent is limited because it applies to use of such third parties by the Administrative Tribunal to "take oral statements" of parties, witnesses and experts.

The recommendation does not describe the process by which such an outside evaluation would be commissioned. Some possibilities include the President in all cases in which any senior official, other than the President, is alleged to have engaged in serious misconduct. Other provision would need to be made in the rare instance where the President is subject to a credible allegation of serious misconduct. Another possibility might involve committees of the Board. The Bank is in a much better position than the consultant to make these determinations, particularly because some of the possibilities implicate the governance of the Bank.

What Standard Is Applicable to a Person Making a Particular Disclosure? In several places documents of the Bank refer to "good faith" as the standard by which a person's disclosure is judged. Bank documents also contain language, such as prohibitions against malicious allegations, that suggest motive rather than or in addition to good faith.

The most common standards in whistleblower protection provisions are reasonable belief that a disclosure addresses covered misconduct or a good faith belief to that effect. The Whistleblower Protection Act and many other whistleblower provisions adopt the "reasonable belief" standard. Some anti-corruption provisions, including the Inter-American Convention Against Corruption, use the standard of "good faith" belief. Good faith belief is an apt standard for disclosures within an institution.

Reasonable belief asks whether a objective observer in the position of the person making the disclosure would believe that the allegation evidenced covered misconduct. Good faith belief asks whether the person who made the disclosure actually believes it. A person may have a good faith belief that is not a reasonable one.

Even though good faith addresses the state of mind of the person making the disclosure, the context and circumstances are relevant as well as the word of the person regarding his or her state of mind. State of mind is a factual question to be determined not only on the word of the individual whose state of mind is being evaluated but also on context and circumstance. The focus, however, remains on what the employee believes not what an objective observer in the position of the employee would believe. "Good faith" is a more forgiving standard than "reasonable belief."

Good faith, however, is not a test of the motive of the whistleblower. A whistleblower can act from selfish reasons as well as altruistic ones and the public interest need not be the sole or principal motive for the disclosure. A motive test is inconsistent with the ordinary meaning of the terms, reasonable belief and good faith belief.

Recommendation Ten: The Bank should make clear that the standard of good faith belief does not permit an examination of a whistleblower's motive.

Comment: The interpretation above is the most likely one of the Bank's standard and the one that the consultant believes that the Bank intends. Motive makes protection more difficult because humans often act with a variety of complex and interrelated motives. Whistleblower protection encourages disclosure of misconduct as long as the good faith standard is satisfied; a person need not be a hero or pure at heart in order to be entitled to protection.

What Information May Not Be Disclosed? Many whistleblower provisions that limit the disclosure of certain types of information, such as national security information, usually do so regarding disclosures outside of an institution, such as an agency or business. Internal disclosures are rarely limited in the same way, although statutes will often direct certain types of information to particular offices within an organization. For example, the Whistleblower Protection Act requires that certain types of information be disclosed only to agency inspectors general or to the Office of Special Counsel.

The Bank's definition of misconduct refers to the "failure to observe" the Bank's "public information disclosure policies." This reference suggests that any limitations on the disclosure of information apply to disclosures outside of the Bank and not to those disclosures permitted within the Bank. The reference to "information security policies" suggests a limitation of the same character. Part Three considers the propriety of such external disclosures..

Are Refusals to Obey Certain Orders or Directives Protected? The Bank's regulations define a whistleblower as an individual "who refuses to engage in and/or reports misconduct." Thus, the Bank expressly protects refusals to participate in misconduct. In doing so, the Bank adopts the approach implicit in legislation such as the whistleblower provision of the Sarbanes-Oxley Act. In interpreting the provision, administrative law judges at the Department of Labor have found that a refusal to participate in an accounting fraud is a disclosure protected by the law. In addition, the Bank's regulations, like federal law in the United States and the law of several states, expressly protect refusals to participate in misconduct.

Recommendation Eleven: The Bank should ensure that staff members are aware of this protection for refusal to engage in misconduct.

Comment: In discussions within the Bank little mention was made of this protection and some staff members seemed unaware of it. In addition, "refusals to engage in misconduct" is not repeated in other portions of the staff rules that set out operative principles. Such a protection is a powerful statement of the Bank's resolve to prevent and to address misconduct within the institution.

This protection also helps to discourage retaliation against whistleblowers. Because a Bank employee may be disciplined for such retaliation, this protection allows an employee to