GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW, Suite #1100
Washington, DC 20006
(202) 457-0034 | info@whistleblower.org

Review of the Inter-American Development Bank
Revised Staff Rule No. Pe-328

November 27, 2012

Improvements from the 2010 version:

Several positive changes were made in Staff Rule No. Pe-328 that address deficiencies that existed in the 2010 policy. These include:

- The addition of the term "regardless of their form of contract," to section 2.1 clarifies the definition of "employee," which was somewhat ambiguous in the previous version.

- Employees are no longer required, but are "encouraged" to report "suspected Misconduct on the part of employees as described in the Bank's Code of Ethics and Professional Conduct." (section 4.1) This is an improvement, as a mandatory duty to disclose puts employees in a Catch 22 situation that is particularly unjust when retaliation is common and protections are weak.

- Section 5.5 of the policy requires that the Office of Ethics and/or Office of Institutional Integrity provide status updates to whistleblowers and recommends that updates be provided within 30 days. But, while this provision is a significant step in the right direction, the policy would be stronger if it required these Offices to provide updates within 30 days, rather than suggesting that they "endeavor" to do so. Also, this provision does not meet Global Compliance's recommendation that whistleblowers should automatically be notified: "(1) when an investigation is opened; (2) when it is completed, including the outcome of the investigation." Global Compliance also recommended that "if the investigation is ongoing for more than the 90 days, status updates should be provided at least every three months to notify the whistleblower that the matter is still under investigation." (p. 56) These recommendations were not incorporated.

- In the new policy, the process for correcting the consequences of retaliation is more defined. In the 2010 policy, it was the responsibility of an unnamed authority to take appropriate measures to address concerns of possible reprisal. The new policy clarifies that this recommendation will be made by the "Ethics Officer, in consultation with the appropriate Bank authorities that s/he deems appropriate, and after hearing the views of the whistleblower," and that the Officer "may recommend to the Vice President for Finance and Administration that s/he directs exceptional measures to mitigate reasonable concerns that a Whistleblower may be subject to retaliation." (Section 10.1) But while the specificity is an improvement, the addition of the qualifier "mitigate" unfortunately weakens the policy so that retaliation will not be prevented or corrected, but merely diluted.

- The definition of concerns that can be referred to national authorities has been expanded to include "concerns regarding the possibility of retaliation." This is a positive expansion that could result in whistleblowers or witnesses receiving additional protections from national governments.

- The burden of proof standard established in section 13.1 of this policy meets the best practice at IGOs and is a significant advance from the 2010 version. Unfortunately, however, other provisions in this policy undermine this burden of proof, as described below, and therefore the overall policy does not meet the best practice standard.

Major deficiencies and loopholes:

According to Section 7082 of H.R. 2055 (the 2012 Consolidated Appropriations Act), the U.S. Treasury Department must certify that the IDB is "making substantial progress" toward "implementing best practices for the protection of whistleblowers from retaliation, including best practices for legal burdens of proof, access to independent adjudicative bodies, results that eliminate the effects of retaliation, and statutes of limitation for reporting retaliation," before the Congress will disburse funds to the IDB for its General Capital Increase. Unfortunately, despite some minor advances, the revised policy does not fully meet *any* of these standards.

- **Provisions that undermine the burden of proof standard:** The definition of retaliation in section 2.4.2 states that retaliation "may include, but is not limited to … adverse decisions regarding the continuity of employment, including the non-renewal of a fixed term or other temporary contract*, except when based on the appropriate application of Bank staff rules, policies, regulations and contract terms*." (emphasis added) Moreover, according to section 2.4.5, "Retaliation does not include: (i) Bank actions that are based on the appropriate application of Bank staff rules, policies, regulations and contract terms; and (ii) Bank actions, including sanctions for Misconduct, that may be perceived by a Whistleblower as adverse but are related to or based on policy considerations, facts and circumstances other than the party's having acted as a Whistleblower."

  In isolation, these provisions fail to meet best practices for the burden of proof. By definition, any pretext "relates to" a legitimate basis for action that is being used as an excuse. If an employee were fired or otherwise affected because of lawful whistleblowing, permitting protections to be overridden by other Bank "policies" creates an absolute loophole to invalidate all rights in this policy. As a result, the test of provision 2.4.2 should have a reference integrating it with the standards in section 13.1: If the action occurs because of lawful whistleblowing, independent justification must be proved by the three elements in the normal burden of proof to establish an employer's affirmative defense: 1) clear and convincing evidence that the Bank 2) would have taken the same actions for 3) independent reasons in the absence of protected activity. To illustrate, a *preponderance of the evidence* that the Bank *could* have acted independently flatly violates the legal standard but is permissible under this policy.

- **Lack of access to independent adjudicative bodies:** The revised IDB policy also fails to meet the U.S. standard that requires "access to independent adjudicative bodies." Initially, it permits the Office of Ethics to refer the retaliation complaint for resolution to whomever it deems as "*the appropriate authorities."* This means that there is no guarantee of independent due process, which has been replaced by a blank check to let the accused serve as initial judge and jury of its own misconduct.

  On an appellate level, the Tribunal cannot be seriously described as "independent." The Tribunal is internal to the IDB, and its judges are paid for and appointed by the IDB. As Matthew Parish, a lawyer and scholar who previously worked in the Legal Department of the World Bank, observed, Intergovernmental Organizations, including the Banks', have "no impartial adjudicative body to apply or enforce" laws, refuse "to draw even upon the most elementary principles of human rights law" and are "created entirely by the organization against which it is sought to be enforced."[1]

  Moreover, U.S. law 22 U.S.C. 262o4(11) requires the U.S. Executive Director to advocate for "access to independent adjudicative bodies, including external arbitration based on consensus selection and shared costs" in whistleblower cases. The revised policy does not provide this option, which could potentially provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether the IDB must waive its immunity from national legal systems. Rather, the Bank has established a mediation process, as described in PE-323. That policy does not describe how the mediator will be selected or compensated, which precludes the mediator's legitimacy as an independent actor. Further, mediation is only an Alternative Dispute Resolution ("ADR") substitute for settlement negotiations. The policy is only preliminary without arbitration, the ADR component for conflicts that serves as a substitute for hearings or trials.

- **Failure to provide a make-whole remedy**: The best practice for national and intergovernmental organization (IGO) whistleblower protection rights is to guarantee comprehensive relief when a whistleblower prevails. Otherwise, an employee can still lose by winning. The policy, however, does not require that the effects of retaliation be eliminated. Section 10.1 only says that the Ethics Officer may recommend that the Vice President for Finance and Administration direct "exceptional measures to mitigate reasonable concerns that a Whistleblower may be subject to retaliation…" This does not necessarily guarantee that the relief will be comprehensive enough to make the whistleblower whole or that results that eliminate the effects of retaliation will be implemented. It therefore does not meet the best practices standard.

  The new policy also says that the Bank "shall not be obligated to *take any exceptional measures* or to provide remedies that are unrelated to the retaliation or that extend beyond the entitlements provided for by the employee's contract of employment *or the Bank's contractual commitments to external parties, including the award of further contracts."* (section 10.5) The use of the word "exceptional" is disturbing. The scope of potential

[1] Parish, Matthew. "An Essay on the Accountability of International Organizations. International Organizations Law Review. 7:2 (2010): p. 7

retaliation and harassment against a whistleblower is limited only by the imagination and is often customized to strike at a whistleblower's unique vulnerabilities. In some cases, "exceptional" measures may be needed to protect a whistleblower who has raised concerns in good faith. The Bank's lack of a commitment to doing so is a major deficit in the revised policy. The policy only includes Ethics Office *recommendations* for necessary relief, not the *right* to be made whole so the employee is no worse off than if retaliation had not occurred. The term "exceptional" creates discretion for an arbitrary, all-encompassing loophole, and means the policy fails this third cornerstone for a minimally acceptable policy. The commitment should be to take whatever measures, routine or extraordinary as long as lawful, that are necessary to make the whistleblower whole.

- **Deficient statute of limitations:** Another prerequisite for the U.S. contribution to the General Capital Increase is that the IDB implement a best practice statute of limitations for reporting retaliation. Although the policy states that "reporting to a Bank authority should be made promptly once a Whistleblower believes that s/he has been the subject of retaliation," (section 9.3) this broad statute of limitations is undermined by the fact that a whistleblower with a formal grievance is required to observe the time periods for filing a formal grievance (section 9.4). The current statute for filing with the Administrative Tribunal is 90 days. According to the Government Accountability Project's best practices list, which was developed by reviewing whistleblower policies around the world,[2] six months is the minimum functional statute of limitations for whistleblowers to become aware of or act on their rights. One-year statutes of limitations are consistent with common law rights and are preferable.

  Moreover, according to the IDB's October 2012 Code of Ethics and Professional Conduct, reporting of misconduct should be done "no later than three business days after learning of or developing" a suspicion about misconduct (p. 6). In the absence of credible, enforceable whistleblower protections, employees may be hesitant to report misconduct and may not comply with the three day deadline. In contrast, the United Nations whistleblower protection policy protects whistleblowers who make disclosures up to six years after the individual becomes aware of the misconduct.

- **Lack of comprehensive protection for lawful public disclosures:** Sec. 1505 (a)(11) of the U.S. 2006 Foreign Operations, Export Financing and Related Programs Appropriations Act states the policy of the United States toward whistleblower protection policies at the Multilateral Development Banks (MDBs). The legislation requires the U.S. executive director at each MDB to advocate for the implementation of, inter alia, "best practices in domestic laws and international conventions against corruption for whistleblower and witness disclosures and protections against retaliation for internal and *lawful public disclosures* by the bank's employees and others affected by such bank's operations who challenge illegality or other misconduct that could threaten the bank's mission…" *(emphasis added)* The IDB's policy does not meet this standard.

[2] Available at http://www.whistleblower.org/storage/documents/2011_International_Best_Practices_10.25.pdf.

Global Compliance recommended that whistleblowers who go outside the Bank be protected "if they have already made an internal report, but have not received any status of the matter for a time period exceeding six months." (p. 57) As Global Compliance pointed out, similar language can be found in the policies of the UN, WB, ADB and AfDB. Yet the IDB did not add this provision to the revised policy (see section 12.1).

Global Compliance also recommended that the term "authority" for external reports be replaced with the term "individual or entity," as "the requirement that the report be to an authority deviates from the practices of the AfDB (speaking merely of public disclosure), the UN, ADB and WB (using the phrase *an individual or entity* outside of the established internal mechanisms). In order to provide whistleblowers with the opportunity to receive protection even when they make an external report, as long as the reporting meets other stated requirements, we recommend deleting authority and using instead the term individual or entity." (p. 57) The IDB also failed to comply with this recommendation (see section 12.1).

The IDB will further increase the chilling effect against external disclosure through contradictory guidance. Section 12.2 reassures that external reporting "in accordance with this section shall not be considered a breach of the employee's obligations with regard to the Bank's Code of Ethics and professional conduct and other policies governing the use of confidential information." But Section 12.1 already disingenuously contradicted and canceled this reassurance within the policy by limiting protection to external "reporting [that] does not violate the Bank's obligations to protect the confidential information of third parties." This contradiction is unacceptable, and means that the policy fails to meet another cornerstone of the requirements in section 1505. External reports should be protected, especially if public health and safety is at risk, regardless of any confidentiality obligations the Bank may have. Free speech rights should trump gag orders in these circumstances. The policy is comprehensively deficient on legal requirements for public freedom of expression.

Section 7.1 also has contradictory language to the reassurances in section 12.2 that creates an open-ended loophole to the policy's protections. It references unspecified "policies governing reporting" that potential whistleblowers are advised to understand, "as they may apply to the distinct Bank authorities when acting as whistleblowers." Again, the Bank must clearly inform employees whether, when and how its protected activity under the whistleblower policy supersedes contradictory bank policies prohibiting disclosure.

- **Failure to protect the whistleblower's identity and other confidentiality concerns:** The 2010 policy stated that it was the duty of various parties to "protect the confidentiality of information, *including information concerning whistleblowers*." *(emphasis added,* section 106) This language has been removed and replaced with the statement that "it is the duty of each of these authorities to act in accordance with the Bank's policies governing their functions for protecting confidential information" (section 5.3) and that "the identity of an employee or external party who identifies him or herself in making a report of wrongdoing will be confidential." However, the policy then identifies numerous loopholes that undermine these protections (section 7.4)

The best practice in national law and IGO policies is that the whistleblower's identity or identifying information should not be disclosed without his or her express written permission, unless there is an imminent threat to public health or safety from corruption, in which case there should be reasonable prior written notice afforded to the person who made the disclosures.[3] The new policy does not meet this standard, as it also allows the Bank to disclose identifying information without restriction, and the whistleblowers' actual named identity without obtaining his or her permission first, in the following instances:

a) on a "need-to-know" basis to unspecified parties in order to permit an investigation to be undertaken. This exception is particularly disturbing, given the long list of parties that the Bank lists as being "involved in investigations" (see section 5.2);

b) "to respond to the concerns presented." However, the Bank provides no definition of what it means by this;

c) when it is "determined that the employee or external party made allegations that were knowingly false or made with reckless disregard as to whether they were true or false." However, this judgment can be made arbitrarily by any Bank official, with no provision for due process to first establish that the whistleblower spoke out irresponsibly.

d) when there "*appears to be* a risk of imminent danger or serious harm to *individuals or the Bank*." *(emphasis added)* This is a much weaker standard than the best practice "imminent threat to *public* health or safety from corruption." Indeed, one could argue that any person who commits misconduct could appear to be at risk of suffering "serious harm" to their reputation and that any disclosure could cause harm to the Bank's reputation. Moreover, this provision fails to meet the best practice requirement that there be reasonable prior written notice to the whistleblower;

e) the Bank is "requested to disclose such information by a competent judicial authority within a member government and agrees to comply with such request;" or

f) the Bank otherwise has a legal obligation to disclose such information.

The policy does not even provide advance notice or warning to the whistleblowers that their identities are about to be revealed, depriving them of the opportunity to take advance precautionary or mitigation actions. So, in this instance, the Bank is weakening its policy and moving away from best practices in place at other Intergovernmental Organizations. This lack of a commitment to protecting a whistleblower's identity is a major deficit in the revised

[3] See, for examples, the Asian Development Bank Administrative Order No. 2.10, sections 5.1 & 5.4; the African Development Bank Whistleblowing and Complaints Handling Policy, sections 6.1 & 6.9.4; the World Food Programme ED2008/003, section 10; and the United Nations Secretariat ST/SGB/2005/21, section 5.2.

policy. The level of commitment to the protection of whistleblowers and witnesses is a critical measure of the overall commitment of an organization to addressing allegations of fraud and corruption.

Based on this modification, all whistleblowers fearful of retaliation should not work within the IDB Policy. The only safe alternative for them is to act outside of Bank channels.

- **Definition of retaliation:** The definition of retaliation in section 2.41 has been changed from an act "against a Whistleblower for reporting to or cooperating with the Bank's authorities," (in the 2010 policy) to "any action taken or threatened against an individual *to punish him or her* for cooperating in good faith on matters concerning Prohibited Practices [1] or Misconduct[2]…" *(emphasis added)* This change significantly weakens the policy, and negates a best practice since 1989. That year the U.S. Whistleblower Protection Act replaced the requirement to prove retaliatory animus with the requirement merely to prove a causal link. It does not matter whether there are hard feelings. The whistleblower has been harmed for engaging in "protected" activity, and there will be a chilling effect whose avoidance is the point of whistleblower laws. As background, U.S. law was modified after a precedent where the supervisor admitted removing an employee for making vindicated disclosures – not because he wanted to punish the employee. Indeed, the supervisor claimed to have agreed in retrospect that the whistleblower was right. Rather, there was too much tension around the office from the others whose misconduct had been exposed, so he had to do it to keep the peace. The proper standard is to prohibit any "'discrimination' taken 'because of' protected conduct 'that would have a chilling effect on activities covered by the Policy.'"

- **Failure to address potential conflicts of interest:** Global Compliance recommended that there should be alternate reporting venues when one fears retaliation from the individual or office to which reports are directed or believes there is a conflict of interest that would compromise a fair and complete investigation. As an example, Global Compliance wrote: "when an individual honestly believes that a conflict of interest exists for the Ethics Office, or OII, he or she should be allowed access to the President's office for reporting. For allegations involving the President's Office, whistleblowers should be allowed to report to the proposed Board of Directors Ethics Oversight Committee." (page 52) These recommendations were not incorporated into the revised policy (see section 5.2). Although the Conduct Committee of the Board of Executive Directors is mentioned in the policy, it is only available when "a Whistleblower believes that retaliation is undertaken by a member of the Board of Executive Directors" (para. 9.2) and not when other conflicts of interest exist. Without conflict of interest provisions, the policy dictates scenarios where the chicken only is "protected" for making reports of henhouse thefts to the fox. This creates the worst result, where the whistleblower policy properly is perceived as a trap to identify and discredit critics while covering up their concerns before an objective audience hears them. In those circumstances, employees understandably will and should reject the fraudulent policy and instead make it a point to leak evidence to a credible third party outlet instead of working within the system.

Other shortcomings:

- The policy does not currently apply to former employees and applicants for employment, or to volunteers, interns or other unpaid staff who may have relevant evidence. Those categories should be added to the list in section 2.1.

- The definition of a whistleblower has been changed from an employee or external party who reports "allegations of fraud or corruption in Bank activities, or of other misconduct under Bank policies…" (2010 policy, section 102) to an employee or external party who "in *good faith*, reports allegations of fraud, corruption or other Prohibited Practices in Bank-financed activities, as defined in the Bank's Sanctions Procedures, or of Misconduct, as defined in the Bank's Codes of Ethics and Professional Conduct …" (section 2.6, emphasis added) This "good faith" requirement is problematic, as it puts the whistleblowers' motives on trial.

- Global Compliance recommended that the definition of witness be extended to include individuals "believed" to have participated in a Bank investigation, audit or other inquiry (p. 50). The definition in section 2.6 was not updated to include this specific language. All best practices include that provision, for the same reason that employees must be protected despite a "mistaken" belief that they are whistleblowers. Otherwise, the chilling effect can be maximized through mass retaliation for an individual's disclosure.

- The Ombudsman and Staff Association have been removed from the list of offices to which one can report suspected acts of wrongdoing to (see section 5.2). This modification is flatly unacceptable. Ombudsmen are the primary, most commonly used institution that is designed to receive and seek no fault resolution of whistleblowing concerns. They are the primary outlet for whistleblowing disclosures under the OAS Inter-American Convention Against Corruption model whistleblower law. Similarly, the Staff Association is necessary for two reasons: 1) to lock in quality control that prevents potentially erroneous disclosures, and that generates more supporting witnesses for one that is well-taken; and 2) to reduce isolation and foster solidarity, which is the key to survival against retaliation. Often, institutions such as the Staff Association are the only safe vehicles to "launder" whistleblowing disclosures to proper authorities, where it is too treacherous for an individual to act, as here. This modification is a weathervane of bad faith.

- The revised policy includes the following new provision: "employees should use appropriate channels for reporting… Dissemination of allegations through broadly-distributed e-mails or other communication media and to parties that are not authorities for reporting, and the dissemination of unsubstantiated rumors or other defamatory information, are not appropriate use of Bank resources, may not be viewed as whistleblowing, may not be eligible for protections afforded by this Staff Rule and may be subject to disciplinary sanction." (section 5.4) This modification turns the free speech policy into a crude, broad gag order: a blank check for retaliation against anyone who exercises free speech rights except to the Bank's hand-picked audiences. The "dissemination of unsubstantiated rumors" language is subjective and chilling, and the threat of discipline is chilling. It is sufficient to warn that false or irresponsible statements are unprotected. Similarly, depending on the circumstances

and nature of corruption, broad distribution, including the media, may be necessary to warn the public or prevent a crime.

- Global Compliance recommended that a statement be added that clarifies "who in the Bank would be responsible for granting interim relief, under what circumstances, and the types of relief that may be granted." The revised policy does not incorporate this suggestion and whistleblowers may therefore have difficulties exercising their rights to interim relief.

- Section 5.1 and 5.2 list various entities that can receive reports. The policy must be clear that allegations made to these audiences are eligible for protection, or they could become major loopholes for disclosures even within the Bank.