



Offering Options To Potential Whistleblowers

ORGANIZATIONAL OMBUDSMEN CAN BE IN-HOUSE OUTLETS FOR COMPLAINTS

By CHARLES L. HOWARD

The enactment of the Dodd-Frank Wall Street and Consumer Protection Act last year and implementing regulations from the Securities and Exchange Commission earlier this year were strongly opposed by many groups, such as the Association of Corporate Counsel, because they create a bounty system for whistleblower tips made directly to the SEC rather than encourage reporting through a company's internal channels.

Dodd-Frank is only the most recent attempt by the government to ferret out reports of misconduct by giving incentives to whistleblowers; the False Claims Act (FCA) dates back to the Civil War era, and at least from the government's perspective, has been very successful, in recovering tens of billions of dollars by offering a bounty to whistleblowers.

These laws reflect a wider pattern that has emerged over the past few decades in corporate governance, as well as in employment and criminal law, in which organizations have a duty to encourage reporting, investigation, and correction of any misconduct. Yet, given the renewed fear that would-be whistleblowers will bypass internal reporting channels in favor of government bounties, perhaps it is time for a closer look at how companies can strengthen their internal systems to lessen the allure of whistleblower bounties.

Whistleblower Law Limitations

The best place to begin is by looking at the key feature of most whistleblower laws.

Virtually all of them prohibit discrimination and retaliation against someone who meets that law's definition of a whistleblower. Most of them also give a whistleblower who experiences discrimination or retaliation a civil cause of action for damages and reinstatement. And finally, some of the more prominent laws, such as Dodd-Frank and the FCA, create a bounty, whereby the whistleblower may personally recover a portion of government's recovery.

Such whistleblower laws are important and necessary, but when viewed from the bottom up, that is, from the perspective of most employees, they have major limitations — and it is in responding to those limitations that companies have a great opportunity to strengthen their corporate governance systems.

The first problem is one of timing. A bounty is only awarded at the very end of a process that often takes many years from start to finish. Yet, an employee must make a decision at the very beginning of that process about whether to be a whistleblower with no assurance that he or she will ultimately qualify. The perils of uncertainty are made all the greater by complicated procedural and substantive requirements.

For example, how does a Dodd-Frank whistleblower know at the beginning whether his information is "original" or will ultimately result in the government's recovery in excess of \$1 million (both are prerequisites)? Equally important is that data reflect that a bounty is not the primary motivation

of most whistleblowers. The National Whistleblower Center has reported that most whistleblowers tried to raise their issues internally first but to no avail.

A second major limitation is the inability of the whistleblower law to adequately protect whistleblowers from retaliation. The Equal Employment Opportunities Commission reports that retaliation claims are at an all time high, having doubled over the past decade, and account for more claims than age, race or even gender. While good enforcement of a company's anti-retaliation policies seeks to protect employees from "adverse employment action" by or on behalf of the company, it can do little to eliminate or prevent peer retaliation or "under-the-radar" retaliation by supervisors. And yet these other types of retaliation often exist.

Moreover, efforts to encourage reporting run counter to widespread cultural conditioning and the common perception that most whistleblowers suffer adverse consequences from their reporting. If you have any doubts about these assertions, I encourage you to review an article in the May 13, 2010 edition of *The New England Journal of Medicine*, which reported conclusions from a study of successful FCA plaintiffs in the pharmaceutical industry, finding, among other things, that 20 of the 22 industry in-



Charles L. Howard

Chuck Howard, a partner with Shipman & Goodwin, represents organizational ombudsman offices at major corporations, universities and other institutions throughout the United States. He is the author of "The Organizational Ombudsman: Origins, Roles, and Operations — A Legal Guide," published by the American Bar Association in 2010. He can be reached at choward@goodwin.com.

siders were no longer employed in that industry.

Encourage Internal Reporting

It is in the best interests of corporations — and consistent with the goals of regulators — to encourage internal reporting and to protect employees who do come forward. But the question that becomes obvious from the above analysis is, how can companies help their employees report misconduct *so that they do not feel compelled to become a whistleblower*? It is clear that something more than good whistleblower protection policies are needed, and hotlines or help lines are not the answer. While they can also very helpful, they are rarely used and even more rarely used for the type of fraud and abuse issues that led to their creation.

What is needed is a confidential place where employees can go for information or guidance *before* they go to a formal reporting channel. Such a resource should be knowledgeable about both the internal cul-

ture of the organization and what its internal reporting processes entail.

An organizational ombudsman is just such a resource. It is a person or office — working under a charter that assures independence, neutrality, informality, and confidentiality — with whom an employee may speak confidentially, informally and off-the-record about work-related concerns or questions. Establishing an ombudsman program is a way that companies can address employees' fear of retaliation while at the same time providing a way for employees to obtain guidance about both reporting misconduct and resolving other types of workplace conflict.

While not a reporting channel themselves, organizational ombudsmen complement formal reporting channels by providing information and guidance to employees who may be reluctant to come forward through a formal channel. They also can assist employees who want to surface an issue but who do *not* want to be the whistleblower, even with the potential for reward offered by

whistleblower laws such as Dodd-Frank.

There is a need for the type of confidential and off-the-record guidance offered by an organizational ombudsman because at the time an employee is considering whether to make a report, the employee may not even be sure that he or she is correct. Likewise, an employee has no assurance that a report will later qualify for the bounties provided by Dodd-Frank or the FCA.

Building an effective corporate governance system along with a culture of integrity must have more to it than merely a check-the-box approach. A closer examination reveals that it must recognize that if a company wants employees to report misconduct internally, it must find multiple ways to assist them to make this possible. For some employees, a confidential channel where they can first get some guidance is essential. Since the promise of a whistleblower bounty is uncertain at best and the fear of retaliation is so strong and pervasive, an important component of a good system should include such a resource. ■