

Whistleblowing in the U.S.: A Brief Update

Gabe Shawn Vargas

Board Member ECS

Senior Partner, HCM Hostettler & Company (per 1. Feb. 2015)

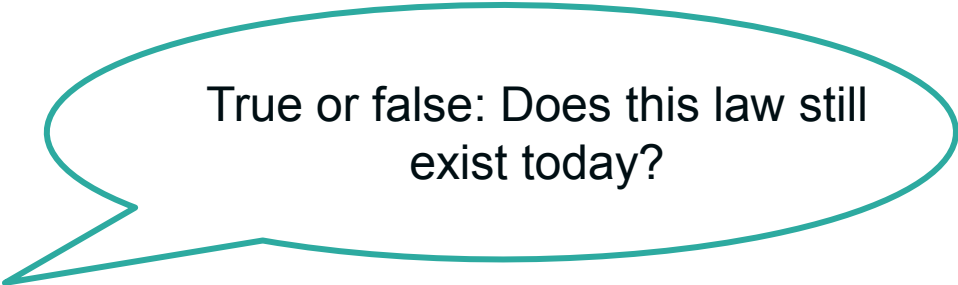
1. Long Roots

- England Middle Ages
- U.S. Colonies
- U.S. Civil War: The **False Claims Act** or “Lincoln Law”

False Claims Act 1863

- For citizens to help fight fraud of suppliers to the Federal Government
- Possibility of getting 15-25% of recovered damages

False Claims Act



True or false: Does this law still exist today?

Yes.
Between 1987 and 2013, nearly
\$40 billion in settlements and judgements

2. Connection to Compliance Programs

- 1991 U.S. **Sentencing Guidelines**, last major revision 2012
- “**Reporting system**” as part of a “effective system to prevent and detect” violations
- But recall: principally criminal law context
- Influences decision to prosecute and can reduce potential liability

“a reporting system whereby employees...report criminal conduct...without fear of retribution.”

3. Beyond financial fraud and criminal law: examples

- **1989 Whistleblower Protection Act**
- Occupational Safety and Health Administration (OSHA) Whistle-Blower Protection Program
- 2002 state example: New York Labor Law Section 741: protects whistleblowers for reporting “improper quality of patient care”

1989 Whistleblower Protection Act

- Protects Federal employees
- Protects reasonable belief of a violation or “gross waste” or “gross mismanagement”

Types of Protection: not always just against being fired

- ❑ Intimidating, bullying
- ❑ Blacklisting, outcasting
- ❑ Demoting or adversely reassigning
- ❑ Denying overtime or promotion
- ❑ Reducing salary, hours, benefits

4. Post Enron

- 2002 **Sarbanes Oxley** Section 301 (SOX)
- Direct obligation of the **Board**
- Audit Committee must create means for “confidential, **anonymous** submissions regarding...accounting or auditing”
- Some companies have created a separate hotline.



SOX

- Elevates the topic directly to the Board level
- Significant connection to the larger governance context
- Explicit requirement of anonymity

2010 Dodd-Frank

- Creates significant **financial incentives** to report:
 - 10% to 30% of collected monetary sanctions
- Covers violation on any securities laws
 - For these purposes, this **includes the FCPA**



- Does it help or hurt compliance programs?
- Incentive to skip internal reporting mechanisms?

Implementation and Impact of Dodd-Frank

- **Dedicated Whistleblower Office** at the SEC
- Not a flood of awards as feared: only 14 so far, but over 10,000 tips from 83 countries.
- \$30 million award in 2014 may encourage future whistleblowers
- The CFTC also has created a whistleblower reward program.



5. Key Challenge: Doing it Correctly

- **Cultural differences**

- Sufficient appreciation of the differences not just among countries but among companies and even among divisions of the same company?



- Work on the culture, not just the reporting line, and ensure reporting is understood as one way to help protect company assets and reputation, not as a goal in itself

- **Communications**

- Often enough? Optimally formulated?



- Employees may not know the reporting option exists or don't understand well its purpose
- If communicated to give the perception that it is only to be used if a violation already has taken place, then it no longer has a preventive benefit
- If communicated as "whistleblowing", it may give the impression of disloyalty rather than as a way for the employee to help the company

- **Operations**

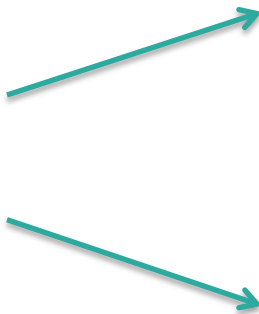
- Sufficient training for those who are to receive employee reportings?



- A particularly risk if the employee is told that he or she can report to multiple functions or people

Whether or not they have an employee reporting system...

- Companies today need to overcome two key challenges



- How to **engage** employees and how to make the company culture **more open** so that discussion, not reporting takes place?
- How to gain the **trust** of employees so that if they feel they need to report, they report **internally**, not externally?

Having a credible, well crafted and well operated employee reporting system can help with these two challenges

6. Outlook

- Interest in whistleblowing and similar efforts is increasing across jurisdictions
 - Little expectation of reversal.
- Dodd-Frank not likely to be undone, and the whistleblowing provisions should survive any revisions.

As companies gain experience with employee reporting, they will need to increase ability to

- see employee reporting within the larger context of governance, company culture, and risk, not just compliance or regulation
- not just to “cope” with whistleblowing but to use it constructively to bring value to the company