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Is This the Age of Whistleblowers?

In a recent interview with the Associated Press, Board member Charles Niemeier of the Public Company Accounting Oversight Board (PCAOB) called today's business environment "the age of whistleblowers"—a new corporate culture in which "informants" are more

likely to be valued than harassed. The PCAOB is now mirroring the long-standing practice of the SEC to make it easy for employees or investors that have knowledge of accounting improprieties to inform the agency so enforcement action can be taken. The PCAOB has begun a new system of online or fax filing and has a toll-free telephone line for the public's use, (800) 741-3158. The system was designed to be more "user-friendly" and enhance public awareness, according to Claudius Modesti, the Board's director of investigations and enforcement. At a time when corporate whistleblowers have become popular heroes, Niemeier said, "We want to allow them to have an easy avenue to report wrongdoing."

For years the SEC has had mechanisms available for whistleblowers and informants to provide information about violations of securities

laws. On the SEC's website, its Center for Complaints and Enforcement Tips gives information on how investors or the general public can send anonymous complaints, tips of a potential violation of the securities laws, or investment-related spam e-mails directly to the SEC Enforcement Division at enforcement@sec.gov. The website also has online forms and a fax number that can be used to pass along information. As a policy, the SEC investigates information that comes to it on a confidential basis, not even publicizing that an inquiry or investigation is in progress. This protects whistleblowers, as do the provisions of Section 806 of Sarbanes-Oxley (SOX), which provides for reinstatement and back pay but not reimbursement of attorneys' fees.



The Internal Revenue Service has an extensive Criminal Investigation Division that is designed to investigate potential criminal violations of the Internal Revenue Code (IRC) in a manner that fosters confidence in the tax system and compliance with the law. Anonymous reports of sus-

pected tax fraud activity can be made by telephone at (800) 829-0433, by mail, or at a local walk-in IRS office. Section 7623 of the IRC provides for payment of a monetary reward to whistleblowers or informants of 15% of the amount recovered by the IRS. The reward must be based on solid information that leads directly to the collection of additional tax.

Section 301 of SOX provides that the audit committees of all public corporations must put into place and oversee the operation of a system that allows for confidential, anonymous employee submissions of concerns about questionable accounting and auditing matters. The fact that the very next section of the law authorizes audit committees to hire others to assist it in carrying out its duties has been considered to be a

suggestion that an outside vendor should provide the whistleblowing service, and a number of suppliers have begun to offer that service. The purpose of this SOX section is to motivate employees to report wrongdoing that relates to fraudulent financial information.

Whistleblowing and the use of informants in law enforcement are well known. Its role in detection of fraud is well documented. A tip from either an insider or outsider, such as a customer or vendor, has been the largest source of detection of occupational fraud, according to the member survey *Report to the Nation* conducted by the Association of Certified Fraud Examiners. The percentage of frauds detected by means of a tip in the 2002 report was a surprisingly large 43%. The percentage in the 2004 report was 39.6%. Both percentages were far larger than the next source.

The False Claims Act provides for a reward to the whistleblower of 15% to 30% of the amount recovered by the federal government from a fraudulent overcharge by a contractor. Protections for whistleblowers include back pay, double back pay, attorney fees, and litigation costs. The Qui Tam Online Network of attorneys provides information for prospective claimants. It reports that awards since 1986 have amounted to almost \$1 billion.

While the case for the importance of whistleblowing is easily made, less demonstrable is whether it has been completely successful. For example, the number of successful claimants to the IRS is disappointing. According to a *Wall Street Journal* article from August 29, 2004, the IRS received a total of about 250,000 reward claims in the years between the late 1960s

through 2003. The IRS gave out rewards for only 7.8% of those claims, paying a total \$76.8 million in the 40-year period. That includes nearly \$4.1 million paid during the year ended September 30, 2003, down from \$7.7 million the previous year. The record year for reward payouts was 2000, when the IRS handed out \$10.8 million. In comparison, little is known about the importance of tips to the SEC's greatly expanded enforcement efforts in the past few years. The agency is extremely tight-lipped about the sources of its information and won't even acknowledge that information has been received.

Also, a survey by the Ethics Resource Center showed a surprising number of U.S. workers are wary of stepping forward to report ethics violations. The study pointed out that 44% of all nonmanagement employees don't report misconduct they observe. The top two reasons for not reporting were "a belief that no corrective action will be taken" and "fear that the report will not be kept confidential." This points to the critical need for top-level support of a successful ethics and compliance program. It also focuses on the need for a trusting corporate environment before any program that involves asking employees to put the interests of the organization ahead of those of coworkers or management requests can be successful.

The feedback from certain foreign countries after announcement of a confidential help/hotline was surprising. "Workers around the world often have widely differing feelings about reporting ethical violations at companies," says Alexandra Wrage, president of Trace International, a nonprofit antibribery business association, in a November 9, 2004, *Wall*

Street Journal article. For employees at companies in France and Italy, Wrage reports that the idea of anonymous reporting tools often sparked memories of their countries' experiences with collaborators during World War II. Staffers in Russia expressed concerns about a return to Big Brother tactics.

In some Middle Eastern countries, Wrage discovered that employees identified with the company as a local entity but were unlikely to report problems to a distant headquarters. The lessons to be learned here include the need to consider local cultural factors in every initiative affecting the corporate culture. Proper translation of documents is also an important factor to achieve success. It's interesting to note that the EU version of SOX doesn't contain a similar requirement that encourages employee whistleblowing.

Another important factor to keep in mind is that, although these initiatives seem to be universally tabbed with the designation of "whistleblowing," not everyone contemplates going outside the organization with detrimental information. IMA members should be particularly alert to the provision of the IMA Standards of Ethical Conduct that requires practitioners to:

"Refrain from disclosing confidential information acquired in the course of their work except when authorized, unless legally obligated to do so." ■

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