

We Need More Whistleblowers

Whistleblowers are still a major source for uncovering fraud and wrongdoing within companies, but being a whistleblower is a difficult, arduous process with an uncertain conclusion. New efforts by the SEC and OSHA may make it a little easier for whistleblowers to come forward, and the increase in fraud shows the need for them is greater than ever.

Only a little more than seven years ago, *Time* magazine honored three women as Persons of the Year. Each of them was a whistleblower who exposed wrongdoing at the highest levels of large organizations. Sherron Watkins exposed the fraudulent financial reporting of Enron, Cynthia Cooper did the same at WorldCom, and Coleen Rowley wrote a 13-page letter detailing the unethical FBI coverup of terrorist activity in the U.S. prior to the September 11, 2001, terrorist attacks. Each of these whistleblowers was rightly viewed as a hero of her time. No one has been similarly honored since then.

The need for more individuals dedicated to speaking out to bring justice in various scenarios is increasing. Significant settlements of alleged fraud have taken place with the assistance provided by whistleblowers, but the fact

remains that serious organizational wrongdoing appears to be growing, not diminishing. This phenomenon is troubling to every public-spirited citizen.

In 2009, the largest healthcare fraud recovery case in history involved the settlement by Pfizer, Inc. of \$2.3 billion for illegally marketing Bextra, a prescription painkiller drug, for unapproved and potentially dangerous uses not approved by the U.S. Food and Drug Administration. For his efforts in this case, the whistleblower received an award of \$51.5 million. Earlier in the year, Northrup Grumman paid \$325 million to the government for selling faulty electronic components used in military satellites, the second-largest defense contractor fraud case ever. Mary Louise Cohen, a founding partner of the law firm bringing these cases, noted, "It's clear the False Claims Act has made a huge difference in the government's ability to fight fraud, and whistleblowers are essential in that effort."

According to an article in *Modern Healthcare* (Gregg Blesch, "Blowing the whistle," March 15, 2010), the Department of Justice begins about 250 False Claims Act cases each year. The total recovery

to the government in 2009 resulting from these efforts amounted to \$1.6 billion healthcare dollars, which is still believed to be a small fraction of the amount of money lost to fraud. The overwhelming majority of recovery cases are triggered by whistleblowers, who shared in nearly \$164 million for their efforts. Several of those whistleblowers caution that the odds of success aren't always high, and they risked losing their jobs or even careers while possibly gaining nothing in return. "If you do it because you think you're going to get money quickly, you're wrong," said a whistleblower involved in a \$75 million settlement with Medtronic.

In a case described in the *Modern Healthcare* story, Bruce Moilan didn't tell his wife of 30 years or his grown children that he was the one who triggered a secret, multiyear investigation of South Texas Health System that ultimately made him a millionaire. South Texas denies all wrongdoing. Moilan has a conflicted view of the experience, noting it's a "lonely situation for a long period of time that's filled with fear." He states that although he has two master's degrees and two professional licenses, "I am unemployed because I chose to do the



right thing.” As for giving advice to someone who has the feeling that something is unethical or illegal at their company, Moilan says, “I’d tell them to exhaust all internal means within a corporation, and if no action is taken, or the system doesn’t seem to work, then contact an attorney.” This advice closely follows that contained in the *IMA Statement of Ethical Professional Practice*.

The most disturbing aspect of ethics in the healthcare context is the willfully dishonest behavior in which some giant drug companies seem to engage. A story by David Evans in the March 21, 2010, *Washington Post* concludes that Pfizer, Lilly, and others seem to treat the billions in fines they are assessed in settling criminal cases of felony behavior as merely another cost of doing business. According to Jerry Avorn, a professor at Harvard Medical School, “Marketing departments of many drug companies don’t respect any boundaries of professionalism or the law.” Ethics doesn’t appear to be considered at all.

One aspect of deceitful behavior is the widespread promotion of off-label (unapproved) use of drugs. Ostensibly done because of the high cost of bringing drugs to the marketplace, Avorn calls this yet another manifestation of a dysfunctional healthcare system, saying, “It’s an unbearable cost to a system that’s going broke.” The federal prosecutor in the latest Pfizer case stated, “[Pfizer has] repeatedly marketed drugs for things they knew they couldn’t demonstrate efficacy. That’s clearly criminal.” In addition to the 2009 Bextra scandal, Pfizer had been criticized earlier for unlawful

actions involving other drugs. It has also made news for bribery and for suppressing unfavorable clinical research results.

Even though financial wrongdoing in public companies has been prominent in the media recently, whistleblowers haven’t been the trigger lately. The October 2005 Ethics column, “Whether or Not to Blow the Whistle Is a Tough Decision!” reported on the first three years following enactment of whistleblower protections in the Sarbanes-Oxley Act (SOX). This portion of SOX was hailed as a job protection safety net for employees who stepped forward and revealed financial wrongdoing at their companies. But under SOX there’s no penalty motivating employers to comply with the law, only a requirement of reinstatement with back pay.

In the first SOX case to be decided in the courts, the CFO of the Bank of Floyd in Virginia was ordered reinstated in January 2004 since whistleblower protection is available even if no law violation is proven. Yet the bank has avoided rehiring the individual by subsequently expending hundreds of thousands of dollars in legal fees. An appeal was made to a federal court in October 2006 to enforce a February 2005 ruling by an administrative law judge in the Department of Labor (DOL) to reinstate the CFO. That appeal was denied, and the U.S. Supreme Court declined to hear the appeal of this verdict in April 2009. This is the final chapter of the case.

On January 13, 2010, the Securities & Exchange Commission (SEC) announced a new initiative that establishes incentives for indi-

viduals and companies to fully and truthfully cooperate and assist with SEC investigations and enforcement actions. The initiative provides new tools to help investigators develop firsthand evidence to build the strongest possible cases. It’s expected to result in invaluable and early assistance in identifying the scope, participants, victims, and ill-gotten gains associated with fraudulent schemes.

The SEC Center for Complaints and Enforcement Tips (www.sec.gov, File a Tip or Complaint) has also recently highlighted and included a link to the role of the Occupational Safety and Health Administration’s (OSHA) Office of the Whistleblower Protection Program. This DOL agency is tasked with enforcing all laws involving employment discrimination, including federal civil rights, consumer products, environmental, public health, and workplace safety issues. The OSHA Office notes that whistleblower protection became available in 2008 to employees of manufacturers, importers, private labelers, distributors, and retailers of consumer products.

On March 18, 2010, OSHA ordered a Tennessee bank to reinstate a former corporate financial officer and pay more than \$1 million in back wages, interest, attorney’s fees, compensatory damages, and other relief. In a similar finding on March 3, OSHA ordered a California technology firm to pay back wages with interest and approximately \$600,000 in compensatory damages to a California worker who was discharged after raising concerns about misinformation contained in a draft public filing.

continued on page 61

Ethics

continued from page 16

The agency found the bank and tech firm had fired the individuals in violation of the whistleblower protection provisions of SOX.

David Michaels, assistant secretary of labor for OSHA, said, "It is vital that employees be able to raise fraud concerns to their employers without fear of retaliation." He added, "This order reaffirms both the right of employees to raise concerns regarding violations of Securities & Exchange Commission rules and the Labor Department's commitment to protecting that right." Time will tell whether appeals to DOL judges and the federal courts will sustain these rulings.

In summary, new initiatives by the SEC and OSHA may be inaugurating the approach of a new era of honor for whistleblowers. Extending the reach of whistleblower protections to nonpublic companies in industries beyond consumer products would result in increased compliance with income tax laws and provide benefits to the public at large. **SF**

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