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Whistleblowing protection for compliance officers still unsettled, experts say

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"If liberty means anything at all, it means the right to tell people what they do not want to hear," George Orwell told readers in *Animal Farm*, his parable of totalitarianism and centralized control.

This level of liberty is just as important in the monitoring of business as government, and it may be just as unwanted as in Orwell's novel of a brave soul fighting overwhelming control, Jennifer Pacella, a law professor at Baruch College in New York City, said Tuesday.

Pacella led a panel on whistleblowing with Sherron Watkins, who revealed Enron's hollow core; Jon Oberg, who uncovered billions of dollars in fraud and waste in federal student lending; Louis Clark, corporate and financial accountability director at the Government Accountability Project; and Jordan Thomas, chair of the whistleblower representation practice at the law firm Labaton Sucharow.

Oberg and, to a lesser extent, Clark discussed government whistleblowing, which has been central to preventing and detecting fraud and waste since the False Claims Act, a Civil War-era law that rewarded individuals for reporting on businesses that cheated Abraham Lincoln's Union Army.

The False Claims Act is still vibrant 150 years later, encouraging people to find and report on frauds against Medicare, military procurement and other expenditures of taxpayer dollars, and federal whistleblowing also includes Edward Snowden's revelations of civilian surveillance, Clark said.

But when today's corporate leaders hear the word "whistleblower," they don't think of the sales of defective boots and materiel to General U.S. Grant or even Snowden's details of the National Security Agency's alleged mining of electronic communications "metadata" from our smartphones, he added.

Since the Dodd-Frank Act was signed in July 2010, with provisions for the Securities and Exchange Commission and the Commodity Futures Trading Commission to reward certain tips that result in

monetary sanctions, whistleblowers have been scaring corporate officers, the panelists said.

Early reactions to Dodd-Frank, especially as the SEC and the CFTC were developing their rules, focused on identifying and ostracizing whistleblowers who internally reported what they saw as potential fraud, and finding ways to dismiss their tips without determining whether they had merit.

Thanks to experts such as Thomas, who counsels companies on handling internal complaints as well as representing employees who make them, companies are becoming more sophisticated about evaluating complaints that employees or managers are cheating the company and its shareholders.

SEC rules protecting whistleblowers from retaliation, even if their complaints turn out to be unwarranted or exaggerated, also help in raising the internal profile of whistleblowers, Clark said.

But companies are putting nondisclosure and non-disparagement provisions in separation agreements and even in employee handbooks, raising the possibility that employees will feel threatened even if they report conduct that is harming the company, Thomas and Clark noted.

And too many companies still don't acknowledge that whistleblowers, who generally don't expect ? or receive ? any thanks for reporting internal wrongdoing, are often the most dedicated and least cynical of employees who just want what's best for the company, Clark added.

That's why he said GAP will continue to advocate for and represent whistleblowers while the SEC and CFTC try to show that the reason behind their rules ? that people closest to potential misconduct can be encouraged to say something if they see something ? can reduce the incidence of violations.

Compliance at risk despite the rules

Whistleblower rules under Dodd-Frank and the Sarbanes-Oxley Act were ostensibly designed to root out conduct that may have contributed to financial crises and related frauds, such as Enron's schemes, Abacus' misleading disclosures and Bernard Madoff and Alan Stanford's Ponzi schemes.

But the best and potentially most effective whistleblower programs can be found within the company rather than at the SEC, the CFTC or the Financial Industry Regulatory Authority, the brokerage industry monitor, Pacella told Compliance Complete.

"Reporting internally should always be preferable for a business organization, as it helps organizations detect fraud from the inside, thereby avoiding substantial future litigation costs or bad publicity. Further, the existence of internal compliance programs within business organizations is a mitigating factor in determining sentencing under the federal sentencing guidelines in the event that the organization is convicted of criminal activity," Pacella said.

"Given the enormous benefits that whistleblowers provide to their places of employment, it is imperative that corporate cultures begin to accept them as ethical employees, rather than 'troublemakers.'"

But many people at banking, brokerage and advisory firms, who are often closest to these potential violations, may be reluctant to report internally and afraid to report externally by reporting, even anonymously, to a regulator, Pacella noted.

"The Dodd-Frank Act excludes some whistleblowers from receiving financial bounty awards, including

those who obtained their information in the capacity of an employee, member, or officer of a regulatory agency or a self-regulatory organization like FINRA, to name a few. There are also limitations on the ability of auditors and attorneys to receive awards.

"Despite the inability of such persons to receive an award, they are not excluded from retaliation protections and may be protected under both Sarbanes-Oxley and Dodd-Frank. There is a current divide, however, in the federal courts as to whether an internal whistleblower who does not report directly to the SEC is protected from retaliation under Dodd-Frank," Pacella said.

One bright sign for rewarding those who say something when they think they see something was recently noted by U.S. Attorney General Eric Holder, who suggested that the cap on reporting certain potential banking violations be raised, especially in light of some of the fines that have been imposed. The prospects for amending the law, FIRREA, in the near future are bleak, most political pundits have said.

Other bright signs include recent SEC whistleblower awards for a hedge fund employee, and for an audit professional.

Pacella noted that the Fifth U.S. Circuit Court of Appeals in July 2013 ruled that for a whistleblower to be protected from retaliation, he or she must report directly to the SEC, although Sarbanes-Oxley provides clear anti-retaliation protections for those who report internally, albeit without a bounty reward.

"This decision [Asadi v. GE Energy] contradicts the SEC's reasonable interpretation of the statute and I believe we have seen only the beginning as to how courts will interpret Dodd-Frank's protections for internal whistleblowers," she said.

Another unsettled area is whether Dodd-Frank applies to non-U.S. personnel who may be in ideal situations to report on potential violations of the securities or futures rules or the Foreign Corrupt Practices Act, Pacella added, saying the Second Circuit in August 2014 ruled that it did not apply in full.

"The decision [Liu Meng-Lin vs. Siemens] will certainly be problematic for whistleblowers who are located abroad. The refusal to apply [the SEC's anti-retaliation rules] extraterritorially is part of a larger trend of recent court decisions that we have seen. In fact, there is a presumption against extraterritorially unless a statute indicates otherwise," Pacella said.

"To overcome this burden, which I believe would be difficult for the whistleblower located abroad, it would be helpful if there are meaningful and substantial contacts established with the United States regarding wrongdoing or the retaliation that would otherwise be protected by statute but it is not yet clear to us whether those contacts would be strong enough to overcome the burden," she added.

For now, the best course may be to tread carefully, and only after receiving legal advice.

Oberg and Watkins warned that until they are proven right, whistleblowers should expect to be treated as *personae non grata* by their colleagues, and they may face career challenges even after they are vindicated.

But it's also important to avoid being the person in a responsible position who saw something, said nothing and went along with the wrongdoing. Some of her former Enron colleagues who followed this path wound up in federal prison, Watkins said.