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Dodd-Frank Provisions Cause Whistle-Blower Dilemma

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Under recently implemented provisions of the Dodd-Frank Act, whistle-blowers who report violations of securities laws are supposed to be protected from being fired. These protections – which can include reinstatement, double back pay and special damages – are designed to serve as an incentive for individuals to come forward despite the significant risk that they will be retaliated against by their company for exposing the wrongdoing. However, due to two recent and conflicting court decisions on the subject, there remains a very open question on exactly who is covered by these whistle-blower protections.

Both cases dealt with whistle-blowers who reported violations of the Foreign Corrupt Practices Act (FCPA), the statute that makes it illegal for U.S. companies to bribe officials in foreign countries to secure business there. In both cases, the whistle-blowers only reported the alleged violations internally to their supervisors within their respective companies. They did not report them to the Securities and Exchange Commission. And, in both cases, the whistle-blowers were fired for coming forward. So the question before the two courts was whether these whistle-blowers were entitled to invoke the whistle-blower protections under Dodd-Frank even though they never reported the alleged wrongdoing to the government.

Each court took a different view. In April, the federal court in Tennessee found these anti-retaliation protections could apply to FCPA whistle-blowers who only report internally. But in June, the federal court in Texas found that merely reporting internally may not be sufficient. You may also need to report to the SEC to invoke the Dodd-Frank protections. The courts never ultimately decided the issue because they threw out the whistle-blowers' claims for other reasons. But their apparent disagreement presents an unfortunate development in the ever-evolving state of whistle-

blower law. If left unresolved, it will compel whistle-blowers, regardless of what steps they take within their own company, to also report to the SEC. Otherwise, they risk being left out in the cold.

The trouble with this predicament is that in some cases, it is better for all involved – the whistle-blower, the offending company and the public – for the whistle-blower to work with the company to clean up its house without getting the government (and the press) involved. That is because once the government and media step in, it may be more difficult for the company to acknowledge and quickly remedy the wrongdoing. It may also force the whistle-blower to take a more adverse position against the company and endure greater scrutiny and exposure for coming forward. In fact, one of the biggest concerns that surrounded the passing of the Dodd-Frank whistle-blower provisions was that they would undermine companies' internal compliance programs by encouraging whistle-blowers to bypass them completely. Some even argued for a requirement that whistle-blowers report internally first before going to the government.

Such a precondition to Dodd-Frank coverage was rightly rejected, and the concerns about upending compliance programs have not really been borne out. But all of the focus surrounding these internal programs reinforces the important role they can play when administered properly. And it further illustrates the need for whistle-blower flexibility and autonomy in deciding what path makes most sense under the particular circumstances. Unfortunately, until this apparent judicial conflict is resolved or worse yet, if the Texas court decision becomes the prevailing view, the only logical path for a whistle-blower to take will be to go directly to the government as soon as possible.

All of this poses an even more potentially problematic consequence: uncertainty. That is, it sends a message to potential whistle-blowers to proceed at your own risk. The whole point of the newly enacted Dodd-Frank whistle-blower protections (and rewards) is to encourage whistle-blowers to step forward in the face of what can be a lengthy, tiresome and truly harrowing experience. But if there is any uncertainty as to whether a particular whistle-blower will be covered by these protections, or if there is an overly rigid and restrictive view of the particular path the whistle-blower must take, it will undercut the very incentives Dodd-Frank was designed to foster. Potential whistle-blowers may decide it is just not worth all of the trouble.

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