



**Don't Overlook Whistleblower Policies and Procedures to Protect  
Your Privacy and Confidentiality Concerns**

**Paul A. Adams, Esquire  
Ryan P. Siney, Esquire**

Whistleblowers can be a valuable source of information regarding problems within your organization, and the type of information gleaned from whistleblowers can far exceed the details uncovered through internal and external audits or regulatory examinations. Whistleblowers' reports also create legal risks as to the status of the whistleblowers and require a process that can separate the wheat from the chaff. While not every institution is required to have a formal whistleblower program, there are benefits to adopting one, so long as the program is implemented correctly, with the proper internal and external support.

Whistleblowers are employees who make a report, whether to their supervisors or to government agencies, about violations of law or gross mismanagement or abuse of authority within a bank. An employee who makes such a report is generally protected by law from being retaliated against by the bank or other bank employees. The purposes of implementing whistleblower policies are to comply with the various protections granted to whistleblowers and to minimize a bank's liability from regulators and from employees who have been terminated or retaliated against. Employees who allege they have been wrongfully terminated after reporting wrongdoing can bring an action against a bank seeking reinstatement and money damages, and both state and federal regulators can impose fines, sanctions, or even criminal penalties against banks or individuals who take retaliatory action against a whistleblower. Whistleblower policies, when applied properly, encourage employees to report wrongdoing and simultaneously protect the bank and its employees by reducing the likelihood that a whistleblower can bring a successful retaliation claim.

The procedure by which a bank should process reports of wrongdoing depends on several factors. For example, banks which are also subject to Sarbanes-Oxley requirements, and the SEC regulations promulgated thereunder, must establish an independent Audit Committee of the bank's Board of Directors to review and investigate claims made by whistleblowers. Most Audit Committees turn to third-parties to handle incoming claims; employees who suspect wrongdoing can call or write to an independent company with which the bank contracts to process such reports. That company then forwards the reports to the Audit Committee for review and investigation. A bank should also adopt a Code of Ethics and Conduct which enumerates the protections an employee will receive when making a report, and the procedures other employees must follow in order to ensure that no retaliatory action will be taken against the whistleblower.

Many whistleblower reports at banks involve allegations of fraud or theft by a bank employee, the investigation of which requires an examination of the employee's financial transactions at the bank. It is important that any such examination occur pursuant to applicable financial privacy laws, and legal guidance should be obtained before such examination occurs. While the best practice is to obtain permission from the employee to access financial records, either at the time of employment or at the initiation of any investigation, there is an exception from Fair Credit Reporting Act compliance requirements for banks to examine an employee's bank records. Any inquiry into the bank's records should be done by personnel assigned to the Audit Committee so as to support the independence and confidentiality of the whistleblowing process, and confidentiality should be maintained in all stages of the investigation process.

The first step to take after the bank receives a whistleblower's report is to determine which federal and/or state law will apply to protect the whistleblower. The statute to be applied will depend on such factors as:

- Who has made the report: is the whistleblower an employee of the bank itself or of an affiliate or subsidiary?
- Who the report was made to: was the report made internally or to state or federal officials?
- What the report was about: which law or regulation does the report, if true, indicate was violated?

Because different laws may apply depending on the facts of each report, a sound legal analysis of each report should be made as soon as possible.

In addition to the whistleblower provisions of Sarbanes-Oxley, banks regulated by the FDIC are also subject to the Depository Institution Employee Protection Remedy, which requires that no bank discharge or discriminate against any employee after the employee reports a violation of law or other wrongful action. Banks may also face whistleblower issues numerous other federal laws, such as Title VII, which protects employees against discrimination based on race, ethnicity, gender or religion, or the Fair Labor Standards Act, which includes wage and work time regulations.

Pennsylvania law also prohibits retaliation against an employee who makes a good faith report of wrongdoing or mismanagement within the bank. The violation of certain Pennsylvania laws protecting whistleblowers are felonies with fines up to \$500,000.00 and imprisonment up to 10 years.

Because of the variety of federal and state laws which apply to employees who report wrongdoing within the bank, and the potential severity of the sanctions imposed for violating those laws, is important that all banks establish procedures which not only comply with those required by law, but also attempt to reduce the bank's exposure to claims of illegal retaliation by discharged employees. Despite the legal risks associated with these programs, they can be an important source of information to identify and mitigate legal, financial, reputation, and regulatory risks.

For any questions related to this article, or to speak with an attorney about whistleblower laws, policies or procedures, please contact Ryan P. Siney, Esquire or Paul A. Adams, Esquire at (717) 763-1121 or [siney@shumakerwilliams.com](mailto:siney@shumakerwilliams.com) or [adams@shumakerwilliams.com](mailto:adams@shumakerwilliams.com).