

Protect whistleblowers

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In a strange but welcome paradox, the current collapse in the housing market and financial-services sector has led to increased legal protections for whistleblowers and employees fired for doing the right thing. Not until the most recent economic stimulus package, the American Recovery and Reinvestment Act of 2009, has Congress been motivated to enact substantial new legal protections to ensure that employees of private contractors and state and local governments will be protected for disclosing wrongdoing related to the expenditure of federal stimulus funds. Congress will also be considering additional protections for federal employees in this session, along with another bill, the Private Sector Whistleblower Protection Streamlining Act, which attempts to fill in the holes in the current patchwork of laws protecting whistleblowers in specific, sensitive industries.

And Congress is likely to amend the False Claims Act to eliminate the loopholes that some courts have read into that statute.

Notable in looking at the disastrous demise of large investment houses and commercial banks is the scarcity of public whistleblowers—sounding the alarm that sub prime mortgages and exotic derivatives could fatally weaken the financial system in the country. The reason for this scarcity is obvious. The two agencies entrusted with protecting whistleblowers—the U.S. Department of Labor (DOL) and the Merit System Protection Board (MSPB)—have more often obstructed whistleblowers than protected them. Just as the U.S. Securities and Exchange Commission did not effectively enforce the regulatory protections in the securities market, DOL has failed to vigorously enforce the whistleblower statutes and instead has radically narrowed the protection for employees who report fraudulent bookkeeping or fraud on investors under the Sarbanes-Oxley Act. Indeed, the DOL has created substantial hurdles for whistleblowers that are plainly contrary to the plain meaning and intent of whistleblower protection statutes. Similarly, the MSPB and its exclusive reviewing court, the U.S. Court of Appeals for the Federal Circuit, have largely rubber-stamped the retaliation taken by agency management against federal employees and have judicially amended the Whistleblower Protection Act by constructing impediments for whistleblowers inconsistent with the statute.

The proposed legislation, as well as the McCaskill Amendment to the stimulus act, not only would provide stronger substantive protection to whistleblowers but also would clear the way for employees to have a jury in federal court decide their cases. The McCaskill Amendment protects employees who report gross mismanagement of an agency contract or grant relating to stimulus funds; a gross waste of stimulus funds; a substantial danger to public health or safety; or a violation of law, rule or regulation related to stimulus monies.

The proposed Platts-Van Hollen Amendment, which would amend the Whistleblower Protection Act, expands protections for federal employees, permitting them, for the first time, to elect to go into federal district court to litigate retaliation claims before a jury. It also provides, for the first time, that whistleblowers may appeal adverse decisions of the MSPB in appeals courts other than the Federal Circuit. The bill was ultimately stripped from the stimulus package due to objections from Defense Secretary Robert M. Gates, who claimed that protection of national security whistleblowers would endanger national security. Yet Gates failed to recognize that fraud and overbilling by defense contractors, and waste and abuse by employees of the national security agencies themselves, severely damage national security. The bill has substantial bipartisan support, and it is likely that it will pass in some form this session.

The broadest reform is encompassed in the Private Sector Whistleblower Protection Streamlining Act, H.R. 4047, which was first proposed in 2007 and is expected to be reintroduced this month. If enacted, it would establish the first uniform and coherent system of protections for private-sector employees who are retaliated against for reporting violations of law or threats to the public health and safety in a whole range of industries. Instead of being relegated to a DOL administrative process, or a state law claim with limited remedies, these employees— in important industries—may have their claims tried before a jury in federal court.

The McCaskill Amendment and the other two proposed laws tacitly acknowledge what whistleblower advocates have long said: The agencies that are supposed to vindicate employee rights have been largely co-opted by the corporations or government agencies that employ the whistleblowers. Giving employees who blow the whistle the right to go to federal court may be the best protection we have against another economic disaster.

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