

## Whistleblowing by the CPA: Legality vs. Ethics

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### ABSTRACT

There can be a time where the legality of the law may clash with what is the ethical thing to do. This paper explores the legal and ethical trial of the Certified Public Accountant (CPA) as either a member in business or a member in public practice when confronted with a whistleblowing decision. In either of these member roles, the CPA has many seemingly conflicting guidelines driving their decision. Some of these guidelines include the early and current existing regulations under the Securities and Exchange Act of 1933 and 1934. Other federal laws encountered include the Sarbanes-Oxley Act (SOX) of 2002, and the amended Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In contrast with this federal governance, the CPA must also comply with ethical rules imposed by the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct. These regulations define the path for the whistleblowing decision of the CPA. It is in this situation that utilizing their knowledge of the law and their ethical responsibility takes priority in formulating the best moral judgment. This paper is intended to not only inform and assist CPA's with their answer of choice but educate students in higher education in this challenging venture.

Keywords: Whistleblowing, Certified Public Accountant (CPA), Sarbanes-Oxley Act (SOX), Dodd-Frank Act, AICPA Code of Professional Conduct, Ethics

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## INTRODUCTION

This paper explores the legal and ethical dilemma of the Certified Public Accountant (CPA) as either a member in business or a member in public practice when encountering material fraud through factual evidence and confronted with a whistleblowing decision. As a member in business or public practice, the CPA has seemingly conflicting guidelines driving his or her decision to become the whistleblower, as the federal and state laws may conflict with their ethical obligations under professional codes of conduct.

From a legal perspective, whistleblowing involves various federal and state laws. The federal guidelines include regulations under the Securities and Exchange Act of 1933 and 1934, the Sarbanes-Oxley Act (SOX) of 2002, and the amended Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In addition, the State Board of Accountancy rules of conduct serve as another legal avenue that the CPA must consult that may clash with the federal laws. Some states may prohibit whistleblowing by the CPA and other states may allow it as dictated by federal laws. A critical concern is that the State Boards of Accountancy may have the authority to remove a CPA from practice for the publishing confidential client information (Taylor & Thomas, 2013). In contrast with this federal regulation and the State Board of Accountancy rules, the CPA must also comply with ethical rules imposed by the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct.

Compliance with their obligation of the federal law, State Board of Accountancy rules, and the AICPA ethical responsibility may cause confusion for CPAs in determining the best path forward, especially when their license may be at risk. This paper is intended to not only assist CPAs with their pathway but also to inform and educate students in higher education in this complex and ambiguous endeavor.

The path to becoming a Certified Public Accountant (CPA) today requires a significant amount of time and effort. Once certified, CPAs must follow a strict code of ethics as published by the American Institute of Certified Public Accountants (AICPA) and state CPA societies. CPAs are licensed and regulated by their state boards of accountancy, a majority of which have adopted the AICPA Code of Professional Conduct within their state accountancy laws (Mintz, 2018). The AICPA Code of Professional Conduct guides the CPA in providing investors and other important decision makers representing the public interest with objective and reliable financial information.

The AICPA Code of Professional Conduct has distinguished the CPA's role as either the external auditor of the CPA firm auditing the public corporation (1.000.010 "Conceptual Framework for Members in Public Practice") or as an employee of the public corporation (2.000.010 "Conceptual Framework for Members in Business"), as amended in the Code effective December 15, 2014 (AICPA, 2014). The ethical requirements in their professional conduct code are critical for these members, as preserving confidential client information is of utmost importance for each role (AICPA, 2014; Mintz, 2014). Furthermore, client confidentiality for the member in public practice also applies to confidentiality of the CPA's employer for the member in business. As a result, ethical standards as defined by the CPA codes of professional conduct versus the federal and state regulations may cause conflicts and complexities for the member. Regardless of any conflicts, the CPA's civic responsibility remains the top priority.

Section 0.300.030 of the AICPA Code of Professional Conduct explicitly recognizes the CPA's responsibility to the public interest: clients, investors, creditors, government agencies,

employers, and the business community (AICPA, 2014). According to the Code, the CPA as either a member in business or public practice is obligated to serve the public interest, honor the public trust, and demonstrate a commitment to professionalism (AICPA, 2014). Furthermore, the decision makers representing the public interest rely on CPAs and expect them to perform their responsibilities with objectivity, integrity, independence, and due professional care in serving the public (AICPA, 2014). As the CPA is performing their professional responsibilities, they may encounter conflicting pressures from among these stakeholders. In resolving these conflicts, CPAs should act with integrity, guided by the principle that when they complete their responsibility to the public, then clients' and employers' interests are best served (Mintz, 2018). Whistleblowing may be an effective tool the CPA can utilize to combat fraud and protect the public interest. Important legislation throughout the United States' economic history has led to establishment of and guidance for whistleblower protection.

### **SECURITIES AND EXCHANGE ACT OF 1933 AND 1934**

An early government legislation was the Securities and Exchange Act of 1933 and 1934, enacted by Franklin D. Roosevelt's administration (SEC, 2012). The 1933 and 1934 Act responded to the 1929 stock market crash, to which negligent financial reporting was an important contributor. The Securities and Exchange Act of 1933 required that the offer to sell securities previously administered by state laws now must be registered with the Securities and Exchange Commission (SEC) (SEC, 2015). The SEC was created by the Securities and Exchange Act of 1934, and like the 1933 Act, was established to assure transparent financial statements and protect investors against fraudulent activities in the secondary markets. The SEC's chief responsibility under the 1933 and 1934 Act was to ensure truthful information about public corporations to assist in decision making and that securities organizations, including dealers and brokers, offered honest and fair treatment to investors. The assurance of the Act was to entitle investors with comprehensive and precise financial information in the investment of securities.

### **SARBANES-OXLEY (SOX) ACT OF 2002**

The next important legislation resulted from the public uproar and diminished investor confidence from the succession of financial scandals in 2001-2002 involving Enron and WorldCom. From the scandals, these two public corporations and the public accounting firm Arthur Andersen were dissolved. In addition, numerous employees lost their jobs, and billions of dollars in stockholder value became worthless. At the center of attention was the failure by CPAs in discovering fraud. As a result, the Sarbanes-Oxley Act (SOX) was enacted into legislation on July 30, 2002, to restore trust into the market. One important feature of SOX was that it offered protection for the whistleblower. Prior to SOX, whistleblowers of publicly traded corporations who disclosed misconduct had little or no protection.

According to Section 806 of SOX, an employee engages in protected whistleblowing behavior by providing evidence that is reasonably believed to be a violation of (a) federal mail, wire, bank, or securities fraud; (b) a federal law relating to fraud against shareholders; or (c) a regulation of the SEC (SOX, 2002). SOX Section 806 provides protection for corporate whistleblowers of publicly traded corporations discovering and/or reporting clear fraud. This section of SOX focuses on protecting the employees who report the unlawful activities. The Act

stipulates that no public corporation may threaten, harass, suspend, demote, discharge, or discriminate against an employee because of whistleblowing, entitling the employee to relief essential to restore the employee whole under the law (SOX, 2002). In addition to CPAs representing internal employees of public corporations, the Act also protects CPAs as employees of accounting firms or other independent contractors who report financial fraud. In *Lawson v. FMR LLC*, the Supreme Court (2013) declared in a 6-3 opinion that SOX whistleblower protection applied not only to employees of public corporations, but also to employees of private contractors and subcontractors.

Section 806 also permits the whistleblowers who allege an adverse action, such as retaliation by the employer whereby the employee loses his or her job, to file a complaint with the Occupational Safety and Health Administration (OSHA), an agency in the Department of Labor, within 90 days of the action. Section 806 requires the Department of Labor to protect the whistleblower against employers who retaliate and the Department of Justice to criminally charge the retaliating organization. To create a case of retaliation under Section 806 of SOX, the whistleblower must show the engagement in the protected activity, knowledge of the employer about the protected activity, anguish from the unfavorable personnel action, and the implication that the protected activity was an underlying factor in the hostile action. Under the provisions of this law, retaliation protection is provided for either internally reporting fraud or reporting fraud to a government agency. If OSHA has not reached a final decision within 180 days of filing, then the whistleblower has the option to file the grievance in federal district court (Martin, Hoffman, & Casey, 2004; SOX, 2002).

In addition, Section 301 of SOX requires employers to establish internal audit committees to develop procedures for accepting anonymous and confidential information related to internal control, accounting, or auditing concerns. SOX also requires companies listed on the US stock exchange to establish an anonymous whistleblowing hotline. Concerns of fraudulent activity reported to the audit committees are fully protected under whistleblowing guidelines (Gelman, Rosenberg, & Freedman, 2015).

SOX is an important act to assist in overseeing both the public corporations and the public accounting firms. The provisions of SOX provide an outline for ensuring that employees, including auditors, disclose information that could harm investors and other decision makers. Corporate executives understood their obligation to create an ethical corporate culture with adequate corporate controls. According to research by Katz, LaVan, and Lopez (2012), the threat of employer retaliation diminishes the probability of accountant whistleblowing. However, when an individual became conscious of the protection provided under SOX, the possibility of whistleblowing increased. SOX legislation helped to mitigate the undesirable impact of potential employer retaliation from whistleblowing.

The preliminary expectations that SOX would be a valuable solution for whistleblowers may have been too optimistic. The Department of Labor and the federal court decisions limited the classes of employees protected, resulting in employees rarely prevailing in SOX cases. The 2007-2008 global financial crises involving the subprime mortgage market in the United States and banking crises involving the collapse of the Lehman Brothers investment bank compelled the federal government to implement additional legislation. As a result, the Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted into law on July 21, 2010, in an attempt to restore accountability and responsibility in the financial system. In this new direction with Dodd-Frank, Congress took steps to fortify Section 806 of SOX.

## DODD-FRANK ACT OF 2010 – WHISTLEBLOWING AMENDMENTS

One of the important features of Dodd-Frank is strengthening the whistleblower's protection under Section 806 of SOX and incentivizing with monetary awards for whistleblowers who meet specific requirements. The Dodd-Frank provides improved protections for both internal and external grievances. The whistleblower protection Section 922 of Dodd-Frank incentivizes individuals with original inside information to voluntarily whistle-blow directly to the SEC to identify and prosecute those responsible for wrongdoing. In addition, Dodd-Frank was developed to rebuild trust in the markets after these fraudulent disasters occurred within both the financial markets and the Fortune 500 corporations.

The SEC whistleblower program in Section 922 of Dodd-Frank defines a whistleblower as an individual, and not a company or another entity, who willingly discloses original information based on the whistleblower's independent knowledge or analysis and not previously known to the SEC that violations of the securities laws have occurred, are ongoing, or are about to occur in a way prohibited by the SEC's regulations (SEC, 2011). In addition, the whistleblower must reveal evidence of a violation of fraud, whether mail, wire, bank, security, SEC regulation, or a violation of federal law designating fraud against shareholders (Zuckerman & Stock, 2016).

Section 922 (SEC, 2011) of Dodd-Frank also standardizes communication procedures of the Office of Whistleblower (OWB) within the SEC. This revision of the Dodd-Frank over SOX requires the CPA to report directly to the SEC, but the report is not invalidated if previously reported internally. Whistleblowers who do not report their grievance to the SEC, however, lose protection from this act. In *Digital Realty Trust v. Somers*, a February 2018 court case, the US Supreme Court ruled unanimously that anti-retaliation provisions of Dodd-Frank do not extend to an individual who has not reported a possible violation of the securities laws to the SEC (Meshulam & Stratton, 2018).

Prior to Dodd-Frank, an organized and efficient system in the SEC to review whistleblowing tips did not exist. Dodd-Frank developed a new program for employees with responsibilities related to consumer financial services and products (Rosenberg & Phillips, 2011). It also intended to encourage whistleblowing from private-sector employees. Dodd-Frank extended the statute of limitations for reporting whistleblowing to OSHA or directly to the federal courts from 90 to 180 days with increased financial rewards and protection from retaliation (Moberly, 2012). The legislation institutionalized these changes to assist managing whistleblowing tips in a more effective and efficient fashion (Yeoh, 2015).

While CPAs first resolve concerns internally, there are situations when subsequently reporting issues to an external party upholds professional integrity (Taylor & Thomas, 2013). The CPA can provide law enforcement establishments with initial and valuable assistance of the corporate misconduct. The critical component of the Dodd-Frank is that the CPA voluntarily provides original information about the federal securities laws violation to the SEC (Dodd-Frank, 2010). In addition, like SOX, Dodd-Frank offers protection to the whistleblower against discharge and discrimination. The whistleblowing provisions supported by Dodd-Frank helps to stop the violation at an earlier point, protecting both the public's interests and the reputation of the business. The dilemma for the CPA is complying with these regulations, while at the same time complying with State Board of Accountancy rules and maintaining the confidential client information component of the AICPA Code of Professional Conduct.

## AICPA CODE OF PROFESSIONAL CONDUCT

The SOX federal regulation protects the CPA who whistle-blew internally or externally to an agency of the government. Dodd-Frank tightened controls by creating a system of financial incentives and protections to entice whistleblowers to disclose fraudulent violations directly to the SEC's newly created Office of the Whistleblower. Both SOX and Dodd-Frank have mandated federal laws that encouraged whistleblowing by the CPA. These federal regulations dictate the legal path for the CPA, but there is also an ethical path that requires compliance with confidential client information in the members' Code of Professional Conduct (AICPA, 2014; Webber & Archambeault, 2015). In addition, State Boards of Accountancy violations must be considered by the CPA as well.

As the auditor or member in public practice, Section 1.000.020 Ethical Conflicts of the AICPA Code of Professional Conduct (AICPA, 2014) offers guidance when a member suspects fraud, but reporting it without the specific consent of the client violates the member's responsibility to maintain client confidentiality as defined in Section 1.700.001 of the code (AICPA, 2014). Confidential client information is defined in the code as any information acquired from the client that is not public. In addition, the Confidential Client Information Rule of Section 1.700.001 of the AICPA Code of Professional Conduct for the member in public practice shall not be interpreted to relieve the member of the obligation to comply with a validly issued and enforceable subpoena; or to prohibit a member's compliance with applicable laws and government regulations; or to prohibit review of a member's professional practice under AICPA or state CPA society or Board of Accountancy authorization (AICPA, 2014). Therefore, the AICPA Code of Professional Conduct will allow a violation of client confidentiality if the law requires reporting of the issue. Thus, the code will not prohibit the CPA from following the law.

Similarly, as the employee or member in business, Section 2.000.020 Ethical Conflicts of the AICPA Code of Professional Conduct (AICPA, 2014) offers guidance when a member suspects fraud, but reporting the suspected fraud would violate the member's responsibility to maintain the confidentiality of his or her employer's confidential information as defined in Section 2.400.070 (AICPA, 2014). Furthermore, a member would be considered in violation of the "Acts Discreditable Rule" (2.400.001) if the member discloses any confidential employer information acquired as a result of an employment relationship without the proper specific consent of the employer or organization, unless there is a legal or professional responsibility to disclose such information. For example, the member is permitted or may be required to disclose confidential employer information when disclosure is required by law to comply with a validly issued and enforceable subpoena; or to inform the appropriate public authorities of violations of law that have been discovered; or there is a professional responsibility or right to disclose information, when not prohibited by law to comply with AICPA or disciplinary body of a state CPA board of accountancy (AICPA, 2014). Once again, the code will not prohibit the member from following the law.

As either a member in public practice or member in business, consulting with his or her State Board of Accountancy may be helpful for the CPA. In addition, a member may also consider consulting with his or her legal counsel prior to disclosing confidential client information (AICPA, 2014).

## DISCUSSION

As either a member in business or public practice, the CPA has a challenging position in relation to whistleblowing. While federal laws encourage and protect the whistleblower (Mintz, 2014), the State Boards of Accountancy may possibly clash with federal laws. Also, the CPAs AICPA Code of Professional Conduct requires maintaining confidential client information (AICPA, 2014, Webber & Archambeault, 2015). The decision to whistle blow for CPAs, whether in the private or public sector, is complex and critical (Mintz, 2014). The CPA's conflict arises between the legality of whistleblowing and the ethical requirements of the AICPA Code of Professional Conduct and his or her State Boards of Accountancy.

Section 806 of SOX has not proven to be the most effective support for the CPA regarding internal or external whistleblowing. While academics had initially applauded the SOX whistleblower protection guidelines, long-term analyses have questioned their result (Katz, LaVan, and Lopez, 2012). Dodd-Frank has strengthened the SOX rules. Section 922 of Dodd-Frank incentivizes whistleblowers with monetary awards resulting from successful enforcement actions, adds provisions to safeguard whistleblower confidentiality, and enhances anti-retaliation protections when reported directly to the SEC Office of the Whistleblower. The US Securities and Exchange Commission's (SEC) whistleblower program is in its ninth year, and the benefits of the program continue to materialize (SEC, 2019). Furthermore, whistleblower information has aided the SEC's efforts to uncover and stop fraudulent investment schemes. In FY 2019, the Commission received its second largest number of whistleblower tips in a fiscal year. This has resulted in a 74 percent increase since the beginning of the program. Since the agency issued its first award in 2012, the program had awarded approximately \$387 million in whistleblower awards to 67 individuals as of the end of September 2019 (SEC, 2019).

In comparison to the federal laws, the AICPA Code of Professional Conduct "Integrity and Objectivity Rule" (2.100.001) guides the pathway for the CPA in a whistleblowing dilemma by prohibiting a member from knowingly misrepresenting facts or subordinating his or her judgment when performing professional services for an employer. The Integrity and Objectivity Rule (2.100.001) assists when a member and their supervisor or any other individual within the member's organization have a difference of opinion relating to accounting principles application, auditing standards, or other important professional standards including applicable tax and laws or regulations. Furthermore, a member must evaluate the significance of any threats to determine if threats are at an acceptable level. The acceptable level would be when the member's position does not result in a material misrepresentation of fact or violation of applicable laws or regulations. If threats are not at an acceptable level, meaning that there is a material misrepresentation of fact or a violation of applicable laws or regulations, then the member should first discuss his or her concerns with their supervisor. If a difference of opinion is not resolved with the supervisor, then the member should discuss his or her concerns with the appropriate higher level(s) of management within the organization such as the supervisor's immediate superior, senior management, and/or those charged with governance.

If the appropriate action is still not taken, the member should in any order (a) investigate if any other organization internal policies and procedures exist for reporting differences of opinion; (b) determine whether he or she is responsible for communicating to third parties, such as regulatory authorities including external accountants; and/or (c) consult with his or her legal counsel regarding his or her responsibilities (AICPA, 2014). These steps are necessary to ensure that threats to the member's compliance with the Integrity and Objectivity Rule (2.100.001) are

eliminated or reduced to an acceptable level. Most importantly, the member should document his or her understanding of the facts, accounting principles, auditing standards, or other important professional standards involved or applicable laws or regulations and the conversations and parties with whom these issues were discussed.

To help uphold the law and the public interest, CPAs must be aware of not only current legislation regarding whistleblowing, but also of the AICPA Code of Professional Conduct and consult with their State Boards of Accountancy. The AICPA Code does allow whistleblowing by the CPA and permission to comply with an enforceable subpoena, applicable laws, or with AICPA or state society obligations.

It is important to note that because the Dodd-Frank Act is a federal law it takes precedence over state laws and confidentiality restrictions. CPAs now have greater protections when blowing the whistle on financial wrongdoing by the employer and thereby better protecting the public interest. As applicable laws are continuing to be developed and changed, the answer for the CPA depends upon federal law, State Boards of Accountancy decrees, and the level to which states have adopted the AICPA Code of Professional Conduct. CPAs have a valid concern of violating the client confidentiality rules and possibly risking their state license (Taylor & Thomas, 2013). State laws representing client confidentiality confound the whistleblowing decision for CPAs, as these state boards have the authority to suspend or revoke the CPA's license. Nevertheless, even if a state board prohibited disclosure of confidential client information directly to the SEC first, the federal law would take precedence over the state jurisdiction (Taylor & Thomas, 2013). A review by an AICPA task force reveals that majority of the states do not offer an exemption to client confidentiality rules for whistleblowing governed by the regulations, but they do follow the AICPA guidelines. It is highly advisable that CPAs consult with not only their state boards for guidance but most importantly legal counsel for guidance with whistleblowing dilemmas.

## CONCLUSION

Today, the CPA may encounter a whistleblowing dilemma involving financial fraud in his or her career. The dilemma involves the pathway chosen at the outset, whether to whistle blow internally or externally. The decision to whistle blow is complex for the CPA. To help educate and assist the member in this complicated journey, this article highlights whistleblowing with respect to important information on various federal regulations including the Securities and Exchange Act of 1934, SOX, Dodd-Frank, the State Board of Accountancy, and AICPA Code of Professional Conduct.

If whistleblowing is delayed by the CPA due to issues of confusion between legality and ethics, then the economic cost to both the public corporation and the public interest can severely impact both the corporation and the decision makers (Bowen, Call, & Rajgopal, 2010). The knowledge of laws, ethical codes, and leadership promoting strong ethical environments in both public corporations and accounting firms is important to the well-being of organizational members, clients, and all financial decision makers. Proper ethics training in public corporations and institutions of higher education in an accounting ethics course is critical. In addition, legal counsel experienced in whistleblowing laws may be helpful regarding this complex dilemma. Finally, the AICPA Ethics Hotline (1-888-777-7077) is another resource available to assist the member in his or her decision involving legality vs. ethics.



## FUTURE RESEARCH

The intention of this paper focuses on clarifying the legal and ethical pathway for the CPA as a member in business or a member in public practice when involved in a whistleblowing dilemma. Future research on this topic may concentrate on results of court cases involving CPAs as whistleblowers in relation to their legal and ethical requirements, SEC whistleblowing awards or bounty payments given to CPAs and the ethical consequences, retaliation issues, and the importance of educators teaching students in higher education about the importance of the CPA to serve the public interest, honor the public trust, and demonstrate a commitment to proper ethical behavior and professional character.

In order to uphold the current and future integrity of the profession, postsecondary educators must advise accounting students on the significance of professionalism for the CPA. Students must understand the importance of proper ethical behavior by the CPA in serving the public interest. It is critical that educators in ethics classes stress the importance of integrity, as they are molding the character of tomorrow's leaders. Furthermore, this professional character building must be directly related to the CPA and their role in preserving the public interest.



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