



## Corporate & Securities Bulletin

### SEC ADOPTS FINAL RULES ON WHISTLEBLOWER PROGRAM

By Douglas E. Haas and Carrie A. Benedict

Whistleblowers now have an enhanced incentive to provide information to the Securities and Exchange Commission (“SEC”) about possible securities violations. The whistleblower program was established as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), enacted in July 2010. Dodd-Frank added new Section 21F (entitled “Securities Whistleblower Incentives and Protection”) to the Securities Exchange Act of 1934, requiring the SEC to pay an award to specified types of whistleblowers. SEC Chairman Mary L. Schapiro stated that “For an agency with limited resources like the SEC, it is critical to be able to leverage the resources of people who may have first-hand information about violations of the securities laws.” On May 25, 2011, the SEC adopted rules, effective August 12, 2011, that will reward individuals who provide information that lead to successful enforcement actions.

The rules define a “whistleblower” as an individual who, alone or with others, provides the SEC with information relating to a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur.

In order to be considered for an award, a whistleblower must meet the following requirements:

#### **1. Voluntarily provide the SEC...**

A whistleblower provides information “voluntarily” if the whistleblower makes

his submission before a request, inquiry, or demand is directed to the whistleblower or anyone representing the whistleblower (such as an attorney) by the SEC or other specified government related body in an appropriate proceeding. A whistleblower award is not available to an individual who submits information after first being questioned about a matter by the SEC. A whistleblower cannot “voluntarily” submit information if the whistleblower is required to report information to the SEC as a result of a pre-existing legal duty, a contractual duty that is owed to the SEC or other authorities, or a duty that arises out of a judicial or administrative order.

#### **2. ...with original information...**

“Original information” is information that is derived from the independent knowledge or independent analysis of the whistleblower. It must not be already known to the SEC from any other source, exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

“Independent knowledge” is any factual information in the whistleblower’s possession that is not derived solely from publicly available sources. “Independent analysis” means the whistleblower’s own examination and evaluation of

information that may be publicly available but which reveals information that is not generally known or available to the public. Independent analysis requires the whistleblower to do more than merely point the SEC to disparate publicly available information that the whistleblower has assembled.

Independent analysis requires that the whistleblower bring to the public information some additional evaluation, assessment, or insight.

If the information or analysis was acquired by an individual on behalf of a third party operating in a sensitive legal, compliance, or governance role, in the performance of an engagement required by the federal securities laws, or by illegal means, the knowledge does not constitute independent knowledge or analysis.

The SEC will consider a whistleblower to be the original source of the same information that the SEC obtained from another source if the information satisfies the definition of original information and the other source obtained the information from the whistleblower or the whistleblower’s representative. A whistleblower can also be deemed to be an original source of information he or she provides that materially adds to the SEC’s base of knowledge about a matter. It is possible for an initial whistleblower and an additional whistleblower to both receive an award when the additional whistleblower voluntarily provides information that materially adds to what

the SEC already knows about the matter.

### **3. ...that leads to the successful enforcement by the SEC in a federal court or administrative action...**

Information concerning conduct not under investigation or examination will be considered to have led to successful enforcement when it is sufficiently specific, credible, and timely to cause the SEC staff to commence an examination, open an investigation, reopen an investigation that the SEC had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the SEC brings a successful judicial or administrative action based in whole or in part on the conduct identified in the original information.

Information concerning conduct already under investigation or examination will be considered to have led to successful enforcement when the information significantly contributes to the success of the SEC's action. In determining whether information significantly contributes to the SEC's success, it will consider factors such as whether the information allowed the SEC to bring its successful action in significantly less time or with significantly fewer resources, additional successful claims, or successful claims against additional individuals or entities. The SEC will not consider information to have significantly contributed to the success of its action if the SEC or some other law enforcement agency has issued a subpoena or other document request to an entity or an individual other than the whistleblower, there is evidence that the whistleblower was aware of the request, and the whistleblower withheld or delayed providing responsive documents prior to making the related submission to the SEC.

### **4. ...in which the SEC obtains monetary sanctions totaling more than \$1 million.**

Monetary sanctions are any money, including penalties, disgorgement, and interest, ordered to be paid and any

money deposited into a disgorgement fund or other fund as a result of an SEC action or a related action.

### **Internal Compliance Programs**

The SEC, in its rulemaking, did respond to concerns that the whistleblower program might undermine the internal compliance programs established by companies. Although a whistleblower is not required to first report violations through an internal compliance program to be eligible for an award, a whistleblower who first complies with a company's internal whistleblower compliance procedures and within 120 days reports to the SEC is still an eligible whistleblower whose submission to the SEC is measured as if it had been made at the earlier internal reporting date. If another whistleblower makes a submission that causes the SEC staff to begin an investigation into the same matter, the whistleblower who had first reported internally will be considered the first whistleblower who came to the SEC, assuming the reported information was sufficiently specific and credible to have caused the SEC staff to begin an investigation.

To further incentivize whistleblowers to report possible violations to internal compliance programs, if a whistleblower reports original information through his employer's internal whistleblower compliance procedures before or at the same time he reports them to the SEC and the employer provides the SEC with the whistleblower's information or with the results of an investigation initiated in response to the whistleblower's information, and that information leads to the successful enforcement, then the whistleblower will receive full credit for the information provided by the employer as if the whistleblower had provided the information to the SEC.

### **Procedures for Submitting Information**

A whistleblower can submit information in one of two ways. A whistleblower can submit information through the SEC's web-based, interactive database for the submission of tips, complaints,

and referrals or can complete Form TCR (Tip, Complaint, or Referral) and mail or fax the form to the SEC Office of the Whistleblower. The whistleblower must declare, under penalty of perjury, that to the best of the whistleblower's knowledge, the submitted information is true and correct.

### **Amount of Award**

If all conditions are met, the SEC will independently determine the appropriate award percentage for each whistleblower, but award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected in the SEC's action and related actions. The actual awards will be in the SEC's discretion and the rules do not establish a methodology that would permit a mathematical calculation of the appropriate award percentage. While things like the culpability of the whistleblower, unreasonable reporting delay by the whistleblower, and interference with internal compliance and reporting systems by the whistleblower could reduce a whistleblower's award, things like significance of the information provided by the whistleblower, assistance provided by the whistleblower, law enforcement interest in making a whistleblower award, and participation by the whistleblower in internal compliance systems can result in an increase of the award.

### **Anti-Retaliation Protection**

Section 21F provides anti-retaliation employment protection for whistleblowers. Dodd-Frank mandated that employers may not discharge, demote, harass or otherwise discriminate against whistleblowers who properly provide information to specified authorities. The new rules confirm that for anti-retaliation protection purposes, an individual is deemed to be a "whistleblower" if he possesses a reasonable belief that the information he is providing relates to a possible securities law violation that has occurred, is ongoing, or is about to occur, and he reports that information in a manner described in the rules.

Specifically, the rules state that anti-retaliation protections apply whether or not the whistleblower “satisfies the requirements, procedures and conditions to qualify for an award.”

### **Conclusion**

With these new rules, and some recent legislative activity and judicial decisions which expand (and in some instances, repeal) whistleblower protection, companies will need to stay current on new developments. In addition, companies should continue to build strong internal reporting procedures. For assistance in developing or reviewing your internal reporting procedures or if you have questions regarding the final rules, please contact any of our securities attorneys below.

#### **Additional Information**

For more information or if you have questions regarding the proposed rules, please contact:

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