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The SEC's Second Annual Report On Its Whistleblower Program Reemphasizes The Need To Be Prepared For Increased Whistleblowing Activity

In our November, 2011 Client Alert – “The SEC’s Whistleblower Program: Are You Prepared?” – we suggested that companies act proactively to prepare for increased whistleblower activity in light of the SEC’s new Whistleblower Program. Our November, 2011 Client Alert followed the SEC’s first annual report on its Whistleblower Program in which the SEC reported receiving over 300 tips in the first seven weeks of the program.

Today, the SEC released its second Annual Report covering Fiscal Year 2012. The SEC reported that attorneys in its Office of the Whistleblower received (and returned) over 3,050 phone calls from members of the public and that 3,001 whistleblower tips were received. The most common complaints from whistleblowers involved Corporate Disclosures and Financials, Offering Fraud and Manipulation. The SEC also received 190 complaints involving insider trading and 115 complaints involving the Foreign Corrupt Practices Act, both of which are still law enforcement priorities.

These tips came from individuals in all 50 states, the District of Columbia and Puerto Rico. 283 tips -- over 11% of tips received in the United States and its territories -- came from Connecticut and New York. Significantly, tips were received from 49 foreign countries, with the largest numbers

coming from the United Kingdom (74), Canada (46), India (33) and China (27).

As noted in our November 2011 Client Alert, a “culture of whistleblowing” is indeed taking shape. And whistleblowing activity will increase. A recent survey concluded that the SEC’s program is not well known; thus, it is almost a certainty that employees will report misconduct at higher rates once they become aware of the SEC’s program and the possibility that they can report their concerns anonymously, be protected against retaliation by employers and collect up to 30% of SEC recoveries over \$1 million. Significantly, the SEC will be prepared to reward successful whistleblowers -- as reported today, the SEC has over \$450 million in its Investor Protection Fund available to pay whistleblower awards.

Given this increased activity, what should your company be doing? As we suggested in November 2011, companies should review policies and procedures for investigating misconduct and conducting internal investigations. Moreover, now that increased whistleblowing has become a reality, companies should consider a more nuanced approach – taking steps to foster an “ethical culture” where employees feel confident that they can report their concerns internally first without fear of retaliation. An ethical culture is a powerful

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weapon to counteract the huge financial incentives that the SEC's program gives to employees to report their concerns directly to the SEC and bypass internal reporting mechanisms.

While there is no "one size fits all" approach to an ethical culture, there are certain best practices that you can implement right away that will not only decrease misconduct in the workplace, but also create a safe haven for employees to report internally without fear of retaliation. Please contact us if we can help. Obviously, your company benefits if employees report internally first. Rather than first receiving notice of wrongdoing by way of a subpoena from law enforcement (or worse, when federal agents show up at your place of business with a search warrant), internal reporting enables a company to investigate the complaint, and if appropriate, voluntarily disclose any violations. The company remains in control, and can avoid the adverse consequences faced by unethical companies, such as increased criminal and civil sanctions, unfavorable press, reputational damage, a plummeting share price and, on top of all that, securities class action lawsuits and retaliation suits brought by the whistleblower.

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