

Client Alert

NOVEMBER 2011

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The SEC's Whistleblower Program: Are You Prepared?

On November 15, 2011, the SEC reported that its newly established whistleblower program has generated hundreds of tips in the first seven weeks of its existence, and that dozens of enforcement actions have been opened. Corporations should take note that the landscape has now shifted significantly, and that a "culture of whistleblowing" is taking shape. Employers will need to pay careful attention to the new rules affecting whistleblowers and consider whether their policies and compliance procedures for investigating misconduct and conducting internal investigations are adequately tailored to the new rules.

THE SEC'S NEW WHISTLEBLOWER PROGRAM

The SEC's Whistleblower Program, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, pays awards to eligible whistleblowers who provide original information regarding securities law violations that enable the SEC to bring a successful enforcement action resulting in monetary sanctions over \$1,000,000. Since the program began on August 12, 2011, the SEC has received 334 tips relating to market manipulation, improper corporate disclosures and financial statements, offering fraud, and insider trading. Interestingly, 10% of these tips have come from individuals in foreign countries. Going forward, the SEC expects that it will field thousands of tips annually.

The whistleblower program allows for anonymous submissions, and provides that individual identities need only be revealed if required by court proceedings or to further an investigation. A whistleblower must reveal his or her identity to the SEC, however, in order to claim an award.

To qualify as a whistleblower, an individual or group of individuals need only provide information regarding possible violations of the federal securities laws. The anti-retaliation provisions will then apply, regardless of whether the whistleblower qualifies for an award. A whistleblower who alleges he or she was improperly discharged or discriminated against because of having provided the SEC with information can bring an action within six to ten years (depending on the facts of the case) after the improper treatment. If successful, the individual is entitled to: reinstatement with appropriate seniority status; double the amount of back pay otherwise owed, plus interest; and reimbursement of all litigation costs, including attorneys' fees.

If the whistleblower provides information that leads to a successful enforcement action in which the SEC collects more than \$1,000,000 in monetary sanctions, the SEC will pay the whistleblower an award of between 10% and 30% of the amount collected. In determining what amount to award, the SEC will consider a number of factors, such as the specificity and timeliness of the information provided. Of acute interest to all employers, however, is that the SEC will likely increase an award to a whistleblower if the whistleblower first communicates his or her concerns to the company's internal compliance personnel.

IS YOUR COMPANY READY?

Companies must be proactive and consider whether they are adequately prepared. Companies should check their employment policies and manuals and make sure that

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The SEC's Whistleblower Program: Are You Prepared? CONTINUED

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employees are not penalized for reporting to the SEC in the first instance. In addition, given the financial incentive for an employee to report internally to compliance personnel, and a company's obvious interest in learning of a potential violation before the SEC does, companies should ensure that they have robust policies to assist in identifying situations that must be reported, as well as policies and procedures for receiving and investigating tips and complaints. Managers should be trained on how to receive complaints from employees and properly report them to legal and compliance personnel. Managers should also be informed that the anti-retaliation protections have teeth and that companies face exposure if managers act in any negative manner toward whistleblowers, regardless of whether the whistleblower is discharged. At the same time, guidance will be needed as to how to continue to effectively "manage" the whistleblower, particularly the whistleblower who is demonstrating performance deficiencies while in this "protected" category. Indeed, as a general matter, whistleblowers are often disgruntled employees, and it is essential to be mindful of this fact in handling disciplinary proceedings and terminations.

BE PREPARED TO CONDUCT AN INTERNAL INVESTIGATION

When your company's managers or compliance personnel receive a complaint or tip regarding potential illegal activity, it is essential that the complaint be properly handled to best position the company to respond to a government investigation. This is particularly important for newly regulated entities such as hedge funds, which may not have given any consideration to these issues. Communicating tips and complaints to compliance and legal personnel can help protect the confidentiality of key communications as the company investigates and considers its response, particularly when the company brings in outside counsel to conduct an investigation. A proper internal investigation can also pay significant dividends by reducing any potential liability to the SEC in the event of an enforcement action, as well as potentially lowering the costs of a later, more extensive investigation. Companies should establish procedures now to take advantage of cooperation and self-reporting incentives that ultimately lessen any penalty that is levied.

CONCLUSION

There will be whistleblowers, and clearly, the SEC's new whistleblower program will be a significant source of enforcement activity. Even the best companies may have enforcement issues and will need to conduct internal investigations. Taking steps now to be prepared for the realities of the new whistleblower program will be an investment worth making--and ignoring the obvious impact of that program can be costly.

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Whatever your organization's size and needs are for labor, employment or benefits services, Wiggin and Dana's experienced, hands-on, comprehensive and cost-sensitive attorneys will collaborate with you to meet your business needs.

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Our lawyers represent clients involved in regulatory, civil and criminal investigations by federal and state governments, conduct internal and external investigations and advise clients on a broad range of compliance-related matters.

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