

Final Dodd-Frank Whistleblower Rules – How Companies Can Respond

INTRODUCTION »

On May 25, 2011, the U.S. Securities and Exchange Commission (“SEC”) approved the final rules implementing the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹ The provisions authorize the SEC to reward individuals who voluntarily provide the SEC with original information resulting in monetary sanctions exceeding \$1 million in civil or criminal proceedings against companies.

Select highlights of the final ruling include the following:

A. Clarifications

Provides clarification on anti-retaliation protections: whistleblowers are not required to first report violations internally through established compliance programs in order to qualify for government monetary awards. Employees are able to report their information internally first while preserving their “place in line” for a possible award.

B. Eligibility

Identifies persons ineligible for whistleblower awards including: attorneys; foreign government officials; compliance and internal audit personnel; public accountants² working on SEC engagements; officers, directors, trustees, or partners of an entity who are informed by another person; employees of certain agencies; individuals with pre-existing legal or contractual duty to report; individuals who obtain the information by means or in a manner that is determined by a US court to violate federal or state criminal law; and individuals criminally convicted in connection with the conduct.

C. Procedures

Describes procedures for submitting information to the SEC and for making a claim for an award after an action is brought against the alleged persons or company. The claim procedures provide opportunities for whistleblowers to fairly present their claim before the Commission makes a final award determination.³

1. Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

2. In certain instances compliance, internal audit personnel, and public accountants can become whistleblowers.

3. Speech by SEC Chairman: Opening statement at SEC Open Meeting: Item 2 – Whistleblower Program, www.sec.gov/news, May 25, 2011, Chairman Mary L. Schapiro; SEC Adopts Rules to Establish Whistleblower Program, www.sec.gov/news, May 25, 2011.

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HOW COMPANIES SHOULD PLAN FOR COMPLIANCE WITH DODD-FRANK WHISTLEBLOWER RULES »

Companies should continue to encourage employees to utilize internal channels to alert senior management and compliance to potential violations. Important questions companies should consider include:

- » How should management adjust compliance programs to respond to the whistleblower provisions?
- » What can companies do to encourage the use of internal reporting systems?

Management can take several practical steps to effectively respond to the Dodd-Frank whistleblower provisions:

A. *Re-Align the Corporate Culture: Start with the Tone at the Top*

The overall effectiveness of any compliance program is dependent on the commitment of management to clearly demonstrate that fraud and abuse is unacceptable and will not be tolerated.

Consistent, on-going employee communications reinforcing management's position on fraud can help to engender a cultural shift that is advantageous for the company and employees alike.

A theme of a partnership in which all stakeholders are important and must work together to resolve reported violations for the benefit of all should permeate this executive message. Management should focus on developing a corporate culture in which internal reporting of potential violations is taken seriously by management, investigated quickly, assigned appropriate remedial actions, and protects the employee from retaliation.

B. *Enhance Policies and Procedures*

Companies can revamp whistleblower policies developed in response to the Sarbanes-Oxley Act of 2002 to clearly articulate and effectuate an improved internal reporting process that includes whistleblower protections and enhances credibility with the set expectation that every complaint will be considered carefully and investigated in a timely, effective manner. Improved compliance policies can establish standards requiring reported violations to be investigated within 90 days. Furthermore, policies should visibly address anti-retaliation and state that anonymous whistleblowers

can remain anonymous. Related documented standards and procedures should be clear, easy to utilize, and more streamlined, with instructions that are well-publicized. Standards and procedures should ensure transparency in the investigation process.

C. *Embrace Technology as Part of the Solution*

Management can improve technological solutions to facilitate the goals of corporate compliance programs. Internal reporting systems and platforms can be designed to ensure ease of use, anonymity for whistleblowers, and most importantly can create transparency for whistleblowers regarding tracking reported cases anonymously as they progress through quick and comprehensive internal investigations. Improved technological solutions can create a win-win for companies from the perspective of a more streamlined investigation process, and efficient tracking and reporting on compliance violations, and for whistleblowers from the perspective of continuous transparency in the resolution process.

D. *Re-Train Employees*

Long gone are the days of "take the online test and check the box" to certify annual compliance training. Companies must implement training programs that engage employees and directly address the risks and benefits related to compliance matters. Companies should train employees on improved internal reporting systems and educate them on the risks faced by companies (i.e., financial and reputational) as well as those faced by employees (i.e., stress, frustration, impacted relationships with colleagues, etc.) when fraud and abuse remains unreported. Emphasis should be placed on the benefits to all when companies and employees work together to identify and correct potential compliance violations and wrongdoing. Companies should also re-train compliance, legal, and human resources personnel on how to effectively handle whistleblower events. Management can reiterate that everyone is accountable, and that only through open communication can companies and employees build loyalty and strengthen relationships. Companies can better articulate the positive impacts by encouraging employees to report internally first, highlighting the fact that the SEC encourages employees to first utilize company internal reporting processes prior to reporting to the SEC.

CONCLUSION »

Only time will tell as to how companies and employees respond to the final whistleblower provisions. Over the long term, companies should embrace change within their corporate culture by empowering the whistleblower; enhancing existing policies, standards and procedures; leveraging technology; and incorporating mandatory, updated employee training to facilitate improved compliance programs. Employees must have confidence that they can work in a retaliation-free environment in which management takes reports seriously regarding potential violations and allegations of wrongdoing. Adopting a corporate culture based on integrity and open communication will demonstrate to employees that management is serious about preventing potential fraud and abuse, and serious about adhering to a clearly defined set of compliance rules and procedures.

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