

Corporate Alert

SEC Adopts Whistleblower Rules: Is Your Company Ready?

June 2, 2011

On May 25, 2011, the Securities and Exchange Commission (SEC) adopted rules implementing the “Securities Whistleblower Incentives and Protection” provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). These provisions of the Dodd-Frank Act added a new Section 21F to the Securities Exchange Act of 1934 that directs the SEC to pay awards to whistleblowers who voluntarily provide the SEC with original information about a violation of the federal securities laws that leads to a successful SEC enforcement action resulting in monetary sanctions of more than \$1 million. The award must be between 10 and 30 percent of the total monetary sanctions collected in the SEC action and certain related actions. The new SEC rules expand on these provisions and set forth in plain English the procedures that whistleblowers must follow to submit information to the SEC and apply for awards. The new rules will go into effect 60 days after publication in the *Federal Register*.¹

In this alert, we discuss how the new SEC whistleblower program will impact corporate compliance programs, how the new whistleblower program works and what companies should be doing now to prepare for the new regime.

Impact On Compliance Programs

The new rules create additional risks for companies and their corporate compliance programs. Among other things—

- **Employees do not have to first report violations internally.** Despite strong protests from the business community, the new rules do not require employees to first report problems internally through their employer’s compliance procedures. During the past decade, in response to requirements of the Sarbanes-Oxley Act, companies have established hotlines for the anonymous reporting of complaints and have devoted substantial time and effort to the creation of robust compliance programs that encourage internal reporting and prompt investigation and correction of infractions. Because an employee is eligible to receive an award even if he or she bypasses these internal compliance procedures and goes directly to the regulators, the SEC could begin an external investigation before a company even has the opportunity to deal with a problem. Companies understandably are concerned that the lure of large monetary rewards under the new whistleblower regime will undermine corporate compliance programs. The SEC, however, was not insensitive to these concerns and has built into the new rules several incentives to encourage employees to report violations internally. Among other things,
 - in determining the size of a whistleblower’s award, the SEC will consider whether the employee voluntarily participated in, or interfered with, the employer’s internal compliance and reporting systems

¹ The Dodd-Frank Act and the new rules contain “look-back” provisions so that whistleblowers who provide information to the SEC after enactment of the Dodd-Frank Act (July 21, 2010) and before the effective date of the new rules will still be eligible for awards, even if the information concerns a securities violation that predates the statute.



- a whistleblower who reports internally can be eligible for an award if the company thereafter reports information to the SEC that leads to a successful enforcement action; in these situations, the employee will get credit—and potentially a greater reward—for any additional information provided to the SEC by the employer
- a whistleblower who first reports internally will be treated as if he or she had reported to the SEC at the time the internal report was made, provided the whistleblower reports to the SEC within 120 days of the internal report.

It remains to be seen whether these incentives will be sufficient to motivate employees to report internally. Even a minimum award of 10 percent could still be an enticing sum for an employee, and awards in some cases, particularly those involving the Foreign Corrupt Practices Act (FCPA), could total millions of dollars. Also, a whistleblower may decide to bypass internal reporting procedures so that the company does not get credit for self-reporting to the SEC, thereby exposing the company to greater monetary sanctions that would increase the size of the whistleblower's award.

- **Companies may need to respond more quickly to employee complaints.** As discussed above, the 120-day “look-back” period for employees who choose to first report internally will commence when the internal report is made. To reduce the risk that these employees will also report to the SEC before the 120-day deadline is reached, companies will need to be in position to investigate and respond quickly to employee complaints. Companies will also need to promptly evaluate whether they should self-report violations or possible violations to the SEC.
- **Companies are subject to broad prohibitions against retaliation.** The Dodd-Frank Act contains broader anti-retaliation provisions than those set forth in the Sarbanes-Oxley Act, and these new provisions went into effect when the Dodd-Frank Act was signed into law on July 21, 2010. To the extent companies have not already done so, they should revise their anti-retaliation policies and make sure that responsible HR personnel fully understand the new provisions.

Overview of Whistleblower Rules

To understand how the SEC whistleblower program works, it is necessary to understand the meaning of some key terms. Section 21F of the Exchange Act and Regulation 21F require the SEC to pay awards to *whistleblowers* who—

- *voluntarily* provide the SEC with
- *original information* about a violation of the federal securities laws
- that leads to a *successful enforcement action*
- brought by the SEC that results in *monetary sanctions exceeding \$1 million*.

Where these requirements are met, the whistleblower—or whistleblowers, if more than one—is entitled to an award of between 10 and 30 percent of the total monetary sanctions collected in the SEC action and in certain related actions.

Whistleblowers

A whistleblower is any individual who, alone or jointly with others, provides the SEC with information pursuant to the new whistleblower provisions relating to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing or is about to occur. There are several important points to note about the definition of whistleblower:

- Corporations or other entities are not eligible to be whistleblowers.
- The information must relate to a violation of the federal securities laws, not state or foreign securities laws.

- The information must relate to a “possible” violation of the federal securities laws, which the SEC views as information indicating a factually plausible relationship to some securities law violation. Consequently, frivolous submissions will not qualify. On the other hand, violations need not be probable or likely.
- Culpable individuals who have participated in a violation are not ineligible from receiving a whistleblower award unless they are convicted of a criminal violation related to the SEC or related action.²

Voluntarily

A whistleblower will be deemed to have provided information voluntarily only if the whistleblower provides the information to the SEC before the whistleblower receives any request, inquiry or demand about the matter to which the information relates (i) from the SEC; (ii) in connection with an investigation, inspection or examination by any self-regulatory organization (SRO) or the Public Company Accounting Oversight Board (PCAOB); or (iii) in connection with an investigation by Congress, any other federal authority or a state attorney general or securities regulatory authority. The request, inquiry or demand need not be in the context of a formal investigation. The first step in most SEC investigations is the opening of an informal inquiry in which companies and others may be requested to provide information to the SEC on a voluntary basis.

There are several important points to note about the “voluntary” requirement:

- A whistleblower is not required to report information to the SEC within any specified period of time after discovering a possible securities violation. Consequently, a whistleblower who may have been aware of potential wrongdoing for months or even years would still be eligible for an award so long as the individual reported to the SEC before receiving an inquiry, request or demand.
- A whistleblower will still be considered to have provided information “voluntarily” to the SEC even if the whistleblower has already been questioned by company personnel conducting an internal investigation or the whistleblower otherwise becomes aware of a government investigation, unless the whistleblower has already personally received a request, inquiry or demand from one of the specified authorities.³ With respect to internal investigations, however, the SEC will, in determining whether a submission led to a successful enforcement action, evaluate whether a previous request to the employer obtained substantially the same information or would have obtained the information but for any action of the whistleblower in not providing the information to his employer.
- A submission of information to the SEC after an inquiry by a foreign governmental authority will still be considered voluntary.
- A submission will not be considered voluntary if the individual is required to report such violations to the SEC under a pre-existing legal duty, a contractual duty owed to the SEC or any of the other enumerated authorities or a duty that arises out of a judicial or administrative order. To fall within this exclusion, the whistleblower, and not just the whistleblower’s employer, must have an individual duty to report to the authority.

Original Information

A whistleblower must provide the SEC with original information about a possible securities law violation. Original information is information that—

- is derived from the reporting individual’s “independent knowledge” or “independent analysis”

² The SEC will, however, consider the culpability of the whistleblower in determining the amount of an award, and any monetary sanctions that the whistleblower is ordered to pay will not be included when determining whether the \$1 million threshold has been satisfied.

³ The SEC had originally proposed that an employee would not be considered to have provided information voluntarily if the information was within the scope of an inquiry, request or demand that the employer had already received even if the employee was not aware of the government investigation. The SEC did not include this provision in the final rules.

- was not already known to the SEC from any other source, unless the reporting individual was the original source of the information
- was not 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 reporting individual was the source of the information
- is provided to the SEC for the first time after July 21, 2010 (the date of enactment of the Dodd-Frank Act).

Information derived from a person's "independent knowledge" means the information is based on factual information that is not derived from publicly available sources. A whistleblower, however, is not required to have direct, first-hand knowledge of the possible securities law violation. "Independent knowledge" can include information gained from a person's experiences, communications and observations in social as well as business settings. For example, the individual may have obtained the knowledge from information conveyed to him or her by others.

Information derived from a person's "independent analysis" means the information is derived from the person's own examination and evaluation, whether done alone or in combination with others, of information that may be publicly available, but that reveals information not generally known or available to the public. This would encompass, for example, an academic study that, through its analysis of publicly available information, provides vital assistance to the SEC in identifying securities violations.

Exclusions. There are several categories of information that are not considered to be derived from the reporting person's independent knowledge or independent analysis. In most instances, the exclusions are designed to prevent company personnel involved in corporate compliance from seeking a personal financial benefit by "front running" internal investigations and similar processes. The exclusions effectively render officers, directors, attorneys, accountants and internal compliance personnel ineligible for whistleblower bounties with respect to information obtained by them in many situations. The exclusions include situations in which the person obtained the information—

- through a communication protected by the attorney-client privilege, or in connection with the legal representation of a client on whose behalf the person or the person's employer or firm is providing services where the person attempts to make the whistleblower claim for his or her own benefit (in each case, except where disclosure is permitted by SEC rules or state bar rules). These exclusions apply to both in-house attorneys and outside counsel for companies.
- in a manner or by means determined by a U.S. court to violate applicable federal or state criminal law
- because the person was an officer, director, trustee or partner of an entity, and another person informed such person of the alleged misconduct, or where the person learned the information in connection with the entity's processes for identifying, reporting and addressing potential violations of law
- because the person was an employee whose principal duties involve compliance or internal audit functions for an entity, or the person was employed by, or otherwise associated with, a firm retained to perform such functions
- because the person was employed by, or otherwise associated with, a firm retained to conduct an inquiry or investigation of possible violations of law
- as an employee of, or while otherwise associated with, a public accounting firm where the information was obtained through performance of an engagement required of an independent public accountant under the securities laws, and the information relates to a violation by the client or the client's directors, officers or employees.

Significantly, the latter four categories of exclusions will not apply in situations in which the recipient reasonably believes that disclosure to the SEC is necessary to prevent the entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors, or the recipient reasonably believes that

the entity is impeding an investigation of the misconduct. Even more importantly, the latter four categories also will cease to apply (i) if the recipient provided the information to his or her supervisor or to the relevant entity's audit committee, chief legal officer or chief compliance officer, and 120 days have elapsed, or (ii) if at least 120 days have elapsed since the recipient received the information in circumstances indicating that the recipient's supervisor or the relevant entity's audit committee, chief legal officer or chief compliance officer was already aware of the information. Consequently, officers, directors and persons responsible for internal compliance can become eligible whistleblowers 120 days after they report the information to the appropriate internal authority.

A person who obtains information from a person subject to the foregoing exclusions is also ineligible to use the information for a whistleblower claim unless the person from whom the information is obtained is not excluded from using the information, or the whistleblower is providing the SEC with information about possible violations involving that person.

If the SEC already knows some information about a matter at the time a whistleblower comes forward, the SEC will still consider the whistleblower to be the original source of any information provided that is derived from the whistleblower's independent knowledge or analysis and that materially adds to the information the SEC already possesses.

120-day "Look-back." If a whistleblower reports internally pursuant to an entity's internal whistleblower, legal or compliance procedures for reporting possible violations of law and within 120 days reports to the SEC, the whistleblower will be deemed to have provided the information to the SEC as of the date of the internal report. This provision, which allows a whistleblower to maintain his "place in line" with the SEC, is designed to encourage employees to first report internally before going to the SEC.

Successful Enforcement Action

There are three circumstances in which original information provided by a whistleblower will be deemed to have led to a successful enforcement of a judicial or administrative action:

- The reported information was sufficiently specific, credible and timely to cause the SEC to commence an examination, open an investigation, reopen a previously closed investigation or inquire into new or different conduct as part of a current examination or investigation, and the SEC brought a successful judicial or administrative action based in whole or in part on the reported conduct.
- The reported information concerns conduct that was already under examination or investigation by the SEC, Congress, any other federal authority, a state attorney general or securities regulatory authority, an SRO or the PCAOB, and the reported information significantly contributed to the success of the action.
- The whistleblower reported the information through an entity's internal whistleblower, legal or compliance procedures for reporting possible violations of law before or at the same time the information was reported to the SEC; the entity subsequently reported the possible violation to the SEC or provided the SEC with results of an audit or investigation initiated in response to the internal report; the information the entity provided to the SEC led to a successful enforcement action under either of the two foregoing circumstances; and the individual reported the same information to the SEC within 120 days of providing it to the entity. In the adopting release, the SEC explained that simply reporting to a supervisor may satisfy this standard if the entity's internal compliance procedures require or permit reporting misconduct in the first instance to supervisors. Under this third means by which original information will be deemed to have led to a successful enforcement action, an employee will effectively receive credit for information the employer provides to the SEC. The SEC believes that this provision will incentivize whistleblowers to report internally by providing them with a meaningful opportunity to increase their probability of receiving an award, as well as by potentially increasing the size of an award.

Monetary Sanctions Exceeding \$1 Million

Under the whistleblower rules, an "action" generally means a single captioned judicial or administrative proceeding brought by the SEC. For purposes of making an award under the whistleblower rules, the SEC will, however, treat as

an “action” two or more SEC proceedings arising from the same nucleus of operative facts. To determine whether two or more proceedings involve the same nucleus of operative facts, the proceedings, although brought separately, must share such a close factual basis that the proceedings might logically have been brought together in one proceeding. For purposes of calculating the \$1 million threshold, “monetary sanctions” include penalties, disgorgement and interest.

Procedures for Submitting Information

In addition to the requirements discussed above, a whistleblower must also comply with the new rules and procedures for submitting information to the SEC. To be eligible for an award, the whistleblower must submit the information online through the SEC’s Web site or by mailing or faxing a Form TCR (Tip, Complaint or Referral) to the SEC. When submitting the information, the whistleblower must declare, under penalty of perjury, that the information is true and correct to the best of the whistleblower’s knowledge and belief. If a whistleblower chooses to submit the information to the SEC anonymously, his or her attorney must submit the information on the whistleblower’s behalf and certify that, among other things, the attorney has verified the identity of the whistleblower and, to the best of the attorney’s knowledge, information and belief the Form TCR is true, correct and complete.

After submitting information to the SEC, to be eligible for an award, the whistleblower may also be required by the SEC to provide (i) explanations and assistance to help the SEC evaluate the submission, (ii) additional follow-up information related to the submission in a complete and truthful manner, (iii) testimony or other evidence relating to the whistleblower’s eligibility and (iv) a confidentiality agreement covering non-public information that the SEC provides the whistleblower.

The Bounty

If all of the foregoing requirements of the whistleblower rules are met, a whistleblower will be entitled to an award of at least 10 percent and perhaps as much as 30 percent of the total monetary sanctions collected in the successful SEC action as well as in any “related actions.”⁴ Related actions include a judicial or administrative action that is brought by the U.S. Attorney General, an appropriate regulatory authority, an SRO or a state attorney general in a criminal case. To be eligible for an award in connection with a related action, the SEC must determine that the same original information the whistleblower gave the SEC also led to the successful enforcement of the related action under the same criteria the SEC uses in determining awards in connection with the SEC action. The rules clarify that a whistleblower will not be entitled to “double dip” and receive an award under the SEC’s whistleblower regime where the whistleblower has received an award for the same action under the Commodity Futures Trading Commission (CFTC) whistleblower program or where the CFTC has denied an award. In the adopting release, the SEC also noted that a *qui tam* action under the False Claims Act would not qualify as a related action because the action is not brought by the U.S. Attorney General or any of the other entities designated in the rule.

If there are multiple whistleblowers who are entitled to an award, the SEC will have discretion in determining the award percentage for each whistleblower, but, in any event, the total amount awarded will not exceed the 30 percent cap.

When determining the appropriate amount of an award, the SEC will consider several factors that may increase or decrease the award percentage. Factors that may increase the amount of a whistleblower’s award include—

- the significance of the information provided by the whistleblower to the success of the SEC or related action

⁴ The Dodd-Frank Act and the new rules do, however, preclude certain categories of persons from being eligible for an award, even if they otherwise satisfy the whistleblower requirements. These categories include, among others, (i) a person who is, or was at the time the information was acquired, a member, officer or employee of certain regulatory authorities (i.e., the SEC, Department of Justice, PCAOB or self-regulatory or law enforcement organizations) or a foreign government or certain foreign regulatory authorities, (ii) a person convicted of a criminal violation related to the SEC action or a related action, (iii) a person who knowingly and willfully provides false information to the SEC or other authorities in connection with the whistleblower submission or a related action, (iv) a person who is related to, or otherwise resides with, a member or employee of the SEC or (v) a person who obtained the information through performance of an audit of the company’s financial statements required under the securities laws and for whom submission would be contrary to Section 10A of the Exchange Act.

- the degree of the whistleblower's assistance in the SEC or related action
- the SEC's "programmatically interest" in deterring violations through a whistleblower program
- whether, and to what extent, the whistleblower participated in internal compliance systems.

Factors that may decrease the amount of a whistleblower's award include—

- the culpability or involvement of the whistleblower in matters associated with the SEC or related action
- unreasonable delay by the whistleblower in reporting the securities violations
- interference by the whistleblower with the entity's internal compliance or reporting system.

In the final rule, the SEC included additional considerations to take into account when considering the above factors in an attempt to provide greater detail on how award determinations will be made. But because every enforcement action is unique, determining the appropriate award percentage will likely involve a highly individualized review of the specific facts and circumstances surrounding each award using the framework set forth in the final rule.

Protection Against Retaliation

Dodd-Frank Anti-Retaliation Provisions. The Dodd-Frank Act contains broad provisions protecting whistleblowers from retaliation. These anti-retaliation provisions extend not only to whistleblowers who provide information to the SEC under its whistleblower bounty program or who testify or assist in any SEC investigation or action based on, or related to, such information, but also to persons who make disclosures that are required or protected under four additional areas of law: (i) the Sarbanes-Oxley Act; (ii) the Securities Exchange Act of 1934, including Section 10A(m) (accounting and auditing matters); (iii) 18 U.S.C. § 1513(e) (information to law enforcement about a federal offense); and (iv) any other law, rule or regulation subject to the jurisdiction of the SEC.

Under the anti-retaliation provisions of the Dodd-Frank Act, employers cannot discharge, demote, suspend, threaten or harass, directly or indirectly, or in any other manner discriminate against, a whistleblower with respect to the terms and conditions of employment because of any lawful act done by the whistleblower in providing such information, testimony, assistance or disclosures. Aggrieved whistleblowers are entitled to reinstatement and double back pay, with interest and reimbursement of legal expenses. They can pursue their claims in federal court and have up to six years (10 years in certain situations) to bring suit. The Dodd-Frank Act also strengthened the anti-retaliation provisions of the Sarbanes-Oxley Act.⁵

Under the new whistleblower rules, the SEC clarified that, to be eligible for the anti-retaliation protections under the Dodd-Frank Act, the whistleblower must possess a reasonable belief that the information he or she is providing relates to a possible securities law violation that has occurred, is ongoing or is about to occur. To satisfy the "reasonable belief" standard, the whistleblower must genuinely believe that the information demonstrates a possible violation, and this belief must be one that a similarly situated employee might reasonably possess. The reasonable belief standard is expected to discourage bad faith or frivolous reports and abuses of the anti-retaliation protections. To be eligible for the anti-retaliation protection of the Dodd-Frank Act, the whistleblower also must provide the information in a manner

⁵ In addition to the anti-retaliation provisions contained in the Dodd-Frank Act that are discussed above, the Dodd-Frank Act amended the pre-existing whistleblower protections contained in Section 806 of the Sarbanes-Oxley Act, which generally allows an employee to file a discrimination claim against a public company employer that retaliates against the employee because the employee reported to a supervisor or to certain federal authorities a potential violation of any SEC rule or regulation or certain other federal statutes and rules prohibiting fraud. Among other things, the Dodd-Frank Act (i) extends the protections of Section 806 to employees of subsidiaries or affiliates of public companies whose financial information is included in the consolidated financial statements of the public company, (ii) lengthens from 90 to 180 days the period of time for employees to file claims with OSHA, (iii) renders invalid both pre-dispute arbitration agreements for such discrimination claims and any other agreements waiving employee rights under the Sarbanes-Oxley Act whistleblower provisions and (iv) entitles employees to jury trials in actions removed to federal court.

described in the statute. Finally, the SEC's new rules provide that the anti-retaliation protections apply regardless of whether the SEC action is successful or the whistleblower satisfies the requirements, procedures and conditions to qualify for an award.

In May 2011, a federal court rendered the first decision interpreting the anti-retaliation provisions of the Dodd-Frank Act.⁶ Among other things, the court ruled that—

- an individual who makes a disclosure that is required or protected under one of the four additional areas of law mentioned above is entitled to protection under the anti-retaliation provisions of the statute regardless of whether disclosure is made to the SEC
- to be entitled to protection under the statute's anti-retaliation provisions for a report to the SEC under the whistleblower bounty provisions, the whistleblower need not have personally and directly reported to the SEC. The court ruled that the whistleblower would be "acting jointly" with others if the whistleblower gave the information to attorneys retained by the board of directors to investigate his complaint, and the attorneys then reported the information to the SEC.

Preservation of Anonymity. Under the Dodd-Frank Act, the SEC is prohibited from disclosing information that could reasonably be expected to reveal the identity of a whistleblower unless the information must be disclosed to a defendant or respondent in a proceeding brought by the government, or the SEC determines disclosure to certain regulatory authorities is necessary to accomplish the purposes of the Exchange Act and to protect investors.⁷

Other Provisions

Under the new SEC rules, no person may take any action to impede a whistleblower from communicating directly with the SEC about a possible securities law violation. This includes enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications.

The rules also purport to give the SEC direct access to anyone at a company who has initiated communications with the SEC relating to a possible securities violation, even where the SEC knows that the company is represented by counsel. State bar ethics rules generally prohibit a lawyer from communicating directly with a party where the lawyer knows that the person is represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. While the scope of these rules differs from state to state, the rules are generally designed to prohibit ex parte communications with persons who are in controlling positions at an entity, such as officers and directors, who have authority to bind the entity with respect to the matter or whose actions may be imputed to the entity for purposes of civil or criminal liability or whose statements may constitute an admission on the part of the entity.

The new SEC rules attempt to clarify that, if a control person initiates communication with the SEC, direct communications by the SEC with the individual are "authorized by law" for purposes of these state bar ethics rules. It remains to be seen whether the SEC's attempt to trump state bar ethics rules will prevail in court, as courts on several occasions involving other federal agencies have not been receptive to this position.

What Should Companies Do Now?

As discussed above, the new SEC whistleblower regime may pose significant challenges to corporate compliance programs. There are several steps, however, that companies can take to better position themselves when the new rules go into effect:

⁶ *Egan v. Trading Screen Inc.* (S.D.N.Y., No. 1-Civ. 8202 May 4, 2011).

⁷ In certain circumstances the SEC may provide information to the Department of Justice, an appropriate regulatory authority, a self-regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the PCAOB or foreign securities and law enforcement authorities. Each of these authorities, other than foreign securities and law enforcement authorities, is subject to confidentiality requirements, and the SEC will obtain appropriate assurances of confidentiality before providing information to foreign securities and law enforcement authorities.

- **Review and, if appropriate, enhance internal controls.** The adage that the best defense is a good offense certainly applies here. Robust internal financial and disclosure control processes can prevent many possible securities law violations from occurring, and a strong internal audit function not only can deter violations, but also can ferret out and address problems before they escalate.
- **Review and, if appropriate, update compliance programs.** Companies should make sure that—
 - employees are required to promptly report suspected violations internally
 - hotlines for anonymous reporting are easy to use, function properly and are clearly designed to include reporting of possible securities law violations
 - a vigorous education program is in place so that employees know their reporting obligations
 - the “tone at the top” encourages the reporting of infractions and the protection of employees who do so.

Companies will also need to evaluate whether to educate employees about the SEC’s new whistleblower rules in order to highlight the rules’ incentives for internal reporting. Companies may also consider providing additional incentives to employees who report internally.

Companies may also want to consider revising their annual certification procedures for employee compliance with the company’s code of conduct to include an express certification by the employee that he or she is not aware of any securities law violations that have not been reported internally. Companies should also consider seeking FCPA compliance certifications from contractors and agents.

In updating and strengthening their compliance programs, companies with international operations, however, should be sensitive to any local law privacy or other restrictions that restrict employee self-reporting and/or certifications.

- **Review and, if appropriate, enhance internal investigation procedures.** Many companies will need to beef up their internal investigation procedures and resources. The new whistleblower program will put added pressure on companies to investigate and respond quickly to employee complaints. The 120-day period for employees who first report internally will commence when the report is made. Also, compliance personnel may themselves become eligible whistleblowers 120 days after they provide information learned in the course of their duties to the company’s audit committee, chief legal officer, chief compliance officer or supervisor. Working within these timeframes may prove particularly challenging in investigations involving complex fraud or accounting allegations or alleged violations of the FCPA.

Companies should also be prepared for a potential increase in reported violations. The large rewards offered to whistleblowers will likely result in a surge of reports to the SEC that are based not only on the high-quality information that the SEC is seeking, but also reports involving meritless claims. Nevertheless, companies will need to be ready to handle these reports as well to the extent employees also report internally.

- **Establish protocols for self-reporting to SEC.** Companies should establish procedures for whether and when to self-report problems to the SEC. The SEC cautioned that the 120-day period is not intended to be a “grace period” for companies to determine their response to a potential violation, and that, when considering whether and to what extent to grant leniency to a company for cooperating with the SEC, the promptness with which the company self-reports is an important factor. The SEC also emphasized that it did not intend to suggest that an internal investigation should necessarily be completed before a company elects to self-report. The SEC noted that companies frequently self-report in the early stages of an internal investigation, and, depending on the facts and circumstances, the staff may decide to await further results of the internal investigation before deciding on its own course of action.

- **Revise anti-retaliation policies.** The Dodd-Frank Act and the new whistleblower rules provide protection for a broader range of disclosures than the anti-retaliation provisions of the Sarbanes-Oxley Act. HR personnel should be fully briefed on the new provisions, and employee handbooks and codes of conduct may need to be revised to reflect the expanded protection.

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