



SEC Whistleblower Program Handbook

prepared for

Whistleblowers: The Challenges for In-House Counsel

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SEC WHISTLEBLOWER PROGRAM

HANDBOOK

by

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I. BACKGROUND

In 2010, in response to a long series of corporate scandals that defrauded countless investors and shook investor confidence, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), one of the most significant financial reform efforts since the Great Depression. Section 922 of that legislation amended the Securities Exchange Act of 1934 (the “Exchange Act”) by adding Section 21F, entitled “Securities Whistleblower Incentives and Protections.”¹ This new Section 21F required the Securities and Exchange Commission (the “SEC” or “Commission”) to enact a whistleblower program to pay financial awards to individuals who provide information about possible securities violations to the SEC.

Shortly after the passage of Dodd-Frank, the SEC made public its proposed rules to implement the new Section 21 of the Exchange Act. The proposal generated much discussion—the SEC received over 240 comment letters and about 1,300 form letters.² The SEC made a number of revisions to the proposed rules in response to the commentary, and on May 25, 2011, the Commission adopted the final rules governing the new whistleblower program as Regulation 21F.³ Under these new rules, an individual who voluntarily provides the SEC with original information resulting in a successful enforcement action in which the SEC collects over \$1 million in sanctions will be eligible for a financial reward of between 10% to

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¹ Codified at 15 U.S.C. § 78u-6.

² Implementation of the Whistleblower Provisions of the Securities Exchange Act of 1934, Securities and Exchange Commission, Release No. 34-64545 (“Implementation Release”) at 4.

³ 17 C.F.R. § 240.21F *et. seq.*

30% of the amount collected, depending on various factors. The program became effective on August 12, 2011.

The program recognizes, for the first time, that law enforcement authorities need the public's help to effectively and efficiently police the marketplace. The reality is that securities fraud schemes are often difficult to detect and prosecute without inside information or assistance from participants in the scheme, or their associates. As Sean McKessy, Chief of the SEC's Office of the Whistleblower stated in a speech at Georgetown University, the SEC "simply cannot be everywhere," and that "is why the new whistleblower program . . . is so crucial to [the Commission's] work." The program, Mr. McKessy stated, will "help [the SEC] to more quickly identify and pursue frauds that [it] might not have otherwise found on [its] own"; "strengthen [the SEC's] ability to carry [its] mission"; and "save [the SEC] much time and resources in the process."⁴

II. PROTECTIONS FOR EMPLOYEE WHISTLEBLOWERS

Dodd-Frank established new and powerful anti-retaliation protections for individuals who act as whistleblowers, including a new private right of action for employees subjected to retaliatory action from their employer. The Act also significantly improved existing whistleblower-protection laws, most notably the relevant provisions of the Sarbanes-Oxley Act of 2002 ("SOX"). Many whistleblowers are also eligible for other federal and state whistleblower protections.

A. New Anti-Retaliation Protections for SEC Whistleblowers

Under the new Section 21F of the Exchange Act, an employer may not discharge, demote, suspend, threaten, harass, or take any other retaliatory action against an employee who either:

- (i) provides information about his or her employer to the SEC in accordance with the whistleblower rules;
- (ii) initiates, testifies in, or assists in an investigation or judicial or administrative action; or
- (iii) makes disclosures that are required or protected under SOX, the Exchange Act, and any other law, rule, or regulation subject to the jurisdiction of the Commission.⁵

In the event of a retaliatory act, Section 21F(h) grants an automatic private right of action in federal court to all employees who are subjected to the retaliatory act, without the need to exhaust administrative remedies prior to filing.⁶ This right of action, moreover, is not limited to employees of publicly traded companies and its subsidiaries. The remedies available to a plaintiff under this section include reinstatement to the same seniority, double

⁴ Transcript available at <http://www.sec.gov/news/speech/2011/spch081111sxm.htm> (last visited January 10, 2012).

⁵ Exchange Act § 21F (h)(1)(A)(i)-(iii).

⁶ *Id.* at § 21F(h)(1)(B)(i).

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