



# SEC Implements Enhanced Awards and Protections for Whistleblowers

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On August 12, 2011, the whistleblower program of the U.S. Securities and Exchange Commission (the "SEC") took effect, although it applies retroactively to all tips provided to the SEC since July 21, 2010. Under the new whistleblower program, an individual who voluntarily reports to the SEC original information about a possible violation of U.S. securities laws in the past, present, or future which leads to a successful SEC enforcement action resulting in monetary sanctions of more than \$1 million is entitled to a reward of 10% to 30% of the amount of sanctions collected. This program, which also adds protections to whistleblowers against retaliation by their employers, was mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010. This Alert is a follow-up to the Alert we issued on this subject on December 6, 2010.

## **Who Is a Whistleblower?**

An individual who, alone or jointly with others, submits original information (a "tip") to the SEC. A whistleblower does not have to be an employee – e.g., he or she could be a stockholder. A whistleblower can submit a tip anonymously through an attorney. "Original information" means independent knowledge (not generally known to the public) or independent analysis based on data which may be available to the public, but where the wrongdoing is not conspicuous. In either case, the information must not already be known to the SEC.



## Who Is Not a Whistleblower?

- Anyone who obtained the information in violation of any federal or state criminal law.
- A lawyer who obtained the information pursuant to attorney-client privilege or otherwise in connection with providing legal representation.
- An officer, director, trustee, or partner of an entity who was informed by another person of allegations of misconduct, or who learned the information in connection with the entity's process for identifying, reporting, and addressing misconduct.
- An employee whose main duties involve compliance or internal audit functions, or an employee or other associate of a firm retained to perform those functions.
- An employee or other associate of a firm retained to conduct an investigation into possible violations of law.
- An employee or other associate of a public accounting firm who obtained, through performing audit functions, information about possible violations by the engagement client or its directors, officers, or other employees.

The last four bullet points above, but not the first two, are subject to certain exceptions which would allow individuals in these categories to be whistleblowers under specific circumstances.

## What Is the Bounty?

The bounty is paid only if the SEC recovers monetary sanctions of more than \$1,000,000 (the "Recovery"). Within the range of 10%-30% of the Recovery mandated by the statute, the amount of the bounty is based on the level of the whistleblower's involvement. The SEC determines this percentage based on, among other factors:

- The significance of the information in leading to the success of the enforcement action;
- The degree of assistance provided by the whistleblower;
- The law enforcement interest in deterring specific types of violation (e.g., insider trading or Foreign Corrupt Practices Act); and
- The whistleblower's participation in the employer's internal compliance systems (which incentivizes whistleblowers to report suspected violations internally first, before reporting the information to the SEC within 120 days).

A whistleblower may appeal the SEC's denial of an application for an award, but may not appeal the SEC's determination of the amount of the bounty if the determination is based on these factors and the amount is between 10% and 30% of the Recovery.

## What Are the Protections for Whistleblowers?

The law is clear that retaliation against whistleblowers is forbidden. It is illegal for employers to fire, demote, suspend, harass, or discriminate in any way against whistleblowers for reporting information to the SEC or



assisting the SEC in any investigation or proceeding based on the information. Whistleblowers may bring a private lawsuit in federal court against employers for retaliation and, if successful, may be awarded reinstatement, double back pay, litigation costs, expert witness fees, and attorney fees. The SEC may also take legal action against employers that retaliate against whistleblowers.

In addition, the SEC will make every effort to guard the confidentiality of the tip and the whistleblower's identity. Thus, the SEC may not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except under certain circumstances. These exceptions include:

- Disclosure to other governmental or regulatory entities, which are themselves subject to confidentiality requirements; and
- Disclosure, when required, to a defendant in a federal court or administrative action filed by the SEC or another governmental authority to which the SEC provided the information.

To discuss this client alert or any securities law matter, please contact your Lathrop Gage attorney or any of the attorneys listed on this alert.