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# SEC Adopts Final Rules on the Dodd-Frank Whistleblower Program – But Is This a Game Changer?



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## Let's Make a Deal

- Rules provide for a bounty of 10% to 30% of the aggregate monetary recovery from government enforcement actions for persons who voluntarily provide the SEC with original information about potential violations of the federal securities laws that leads to a successful enforcement action, resulting in sanctions of \$1 million or more.
- Effective August 12, 2011



## Who Can Be a Whistleblower?

- A whistleblower is:
  - Any individual who provides information to the SEC regarding a possible violation of the securities laws that has occurred, is ongoing or that is about to occur.
  - May be an employee, agent or someone else outside the company who provides relevant information.
  - The rules also allow anonymous reporting, provided that the anonymous reporting is done through counsel.



## What Does “Voluntary Disclosure” Mean?

- Must provide information to the SEC voluntarily – not in response to a government agency request to the whistleblower.
- Final rules enable an employee to become an eligible whistleblower even if the SEC has already requested similar information from the whistleblower’s employer.
  - *Practice Pointer:* Controlling information in a government inquiry will become important to ensure that employees do not misuse information that they may learn through rumors.
- Information submitted by individuals pursuant to a pre-existing legal or contractual duty to report violations to the SEC or certain other federal authorities specified in the rules will not be considered “voluntary.”





## The Concept of “Original Information”

- A whistleblower must provide original information – it must be derived from either the whistleblower’s “independent knowledge” or “independent analysis” and not already known to the SEC from any other source.
- First-hand knowledge is not required; original information can be derived from the observations and experiences of others.



## Criteria to “Ring the Bell”

- Information provided must:
  - Be sufficiently specific, credible and timely to cause the staff to commence a new investigation, reopen a closed investigation or pursue an inquiry along a new channel of an ongoing investigation;
  - “Significantly contribute” to the success of an enforcement action concerning conduct already under investigation; or
  - Be provided to an employer concurrently or before the submission of such information to the SEC and subsequently cause the company to conduct an investigation and disclose information directly to the SEC such that it satisfies one of the first two prongs.



## Protections Afforded Whistleblowers

- New rules prohibit retaliation by employers and provide whistleblowers a private cause of action in the event that they are discharged or discriminated against by their employers.
- Rules increase the potential recovery to twice back pay and expands application of the protection to all whistleblowers rather than only those whose information leads to a successful enforcement action.
- However, in order to take advantage of the anti-retaliation protections, a whistleblower must possess a “reasonable belief” that the information provided relates to a possible securities law violation.



## Who Is “Generally” Not Eligible

- Individuals generally excluded:
  - Officers, directors, trustees, or partners of an entity, who are informed of allegations of misconduct.
  - Individuals with compliance or audit responsibilities at an entity, who receive information about potential violations.
  - Attorneys cannot be whistleblowers on their own behalf in connection with information they obtained in the course of their representation of a client.
  - Accountants are ineligible for awards in the context of providing outside auditing services to that company.
  - Foreign government officials.
  - Individuals with a pre-existing legal obligation to report information about potential violations to the SEC or to other authorities (e.g., government contracting officers).

**Exception Swallows the Rule: These individuals may report directly to the SEC as whistleblowers to the extent they have a “reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent . . . conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors.” Second, these individuals may report directly to the SEC 120 days after the individual has reported the information internally to appropriate internal resources.**





## Factors Affecting the Award Determination

- Award must be between 10% and 30% of the aggregate monetary recovery by the SEC and/or a “related action” initiated by another government agency.
- Various factors increase or decrease the award percentage:
  - Whether the whistleblower used internal compliance processes.
  - Whether the whistleblower interfered with internal compliance processes.
- Rules allow for an employee to report information internally while preserving his or her “place in line” for a possible award from the SEC if the employee decides to disclose the same information to the SEC within 120 days of such internal report.



## Practical Recommendations

- Use this opportunity to reexamine your internal compliance program. Is the program fully communicated to employees and easy to understand and use?
- Tone at the top – employees should be encouraged to report violations through the company’s whistleblower hotline. Get control of the process “early and often.” Internal reporting benefits the company by enabling it to sort through facts privately before deciding whether something is so serious as to require self-reporting to the SEC.
- Remind employees that periodic certification requirements require them to advise the company of suspected wrongdoing.
- Remind employees that some information is subject to the company’s attorney-client privilege, which is not subject to waiver by employees.
- Reinforce your policies against retaliating against whistleblowers.



## Closing Thoughts







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Scott Sorrels, a member of Sutherland's Litigation Practice Group, has practiced in the securities regulatory and enforcement area for more than 25 years. His practice involves representing public and private companies, their officers and directors, along with financial institutions, accounting and law firms and their principals, in U.S. Securities and Exchange Commission (SEC) enforcement actions, Department of Justice investigations and criminal prosecutions, and complex civil litigation.

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