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A Closer Look at the SEC's New Whistleblower Program

STEVEN A. MEYEROWITZ

The author discusses the key provisions of the new whistleblower program just announced by the Securities and Exchange Commission.

A divided Securities and Exchange Commission has adopted rules that create a whistleblower program that the majority says “rewards individuals who provide the agency with high-quality tips that lead to successful enforcement actions.”

The new SEC whistleblower program provides that, to be considered for an award, a whistleblower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than \$1 million.

Let's take a closer look at the program.

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the SEC to pay rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions and certain related actions.

In passing the Dodd-Frank Act, Congress substantially expanded the agency's authority to compensate individuals who provide the SEC with information about violations of the federal securities laws. Prior to the Act, the agency's bounty program was limited to insider trading cases and the amount of an award was capped at 10 percent of the penalties collected in the action.

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REQUIREMENTS OF THE RULES

The SEC's final rules define a whistleblower as a person who provides information to the SEC relating to a possible violation of the securities laws that has occurred, is ongoing or is about to occur.

To be considered for an award, the final rules require that a whistleblower must:

Voluntarily provide the SEC...

In general, a whistleblower is deemed to have provided information voluntarily if the whistleblower has provided information before a self-regulatory organization, or if the Public Company Accounting Oversight Board asks for it directly from the whistleblower or the whistleblower's representative.

...with original information...

Original information must be based upon the whistleblower's independent knowledge or independent analysis, not already known to the Commission and not derived exclusively from certain public sources.

...that leads to the successful enforcement by the SEC of a federal court or administrative action...

A whistleblower's information can be deemed to have led to a successful enforcement action if:

1. The information is sufficiently specific, credible and timely to cause the Commission to open a new examination or investigation, reopen a closed investigation, or open a new line inquiry in an existing examination or investigation.
2. The conduct was already under investigation when the information was submitted, and the information significantly contributed to the success of the action.

3. The whistleblower reports original information through his or her employer's internal whistleblower, legal, or compliance procedures before or at the same time it is passed along to the Commission; the employer provides the whistleblower's information (and any subsequently-discovered information) to the Commission; and the employer's report satisfies prongs (1) or (2) above.

... in which the SEC obtains monetary sanctions totaling more than \$1 million.

The rules permit aggregation of multiple Commission cases that arise out of a common nucleus of operative facts as a single action. These may include proceedings involving the same or similar parties, factual allegations, alleged violations of the federal securities laws, or transactions or occurrences.

The final rules further define and explain these requirements.

KEY CONCEPTS

Avoiding Unintended Consequences

Certain people generally will not be considered for whistleblower awards under the final rules. These include:

- People who have a pre-existing legal or contractual duty to report their information to the Commission;
- Attorneys (including in-house counsel) who attempt to use information obtained from client engagements to make whistleblower claims for themselves (unless disclosure of the information is permitted under SEC rules or state bar rules);
- People who obtain the information by means or in a manner that is determined by a U.S. court to violate federal or state criminal law;
- Foreign government officials;

- Officers, directors, trustees or partners of an entity who are informed by another person (such as by an employee) of allegations of misconduct, or who learn the information in connection with the entity's processes for identifying, reporting and addressing possible violations of law (such as through the company hotline);
- Compliance and internal audit personnel; and
- Public accountants working on SEC engagements, if the information relates to violations by the engagement client.

However, in certain circumstances, compliance and internal audit personnel as well as public accountants could become whistleblowers when:

- The whistleblower believes disclosure may prevent substantial injury to the financial interest or property of the entity or investors.
- The whistleblower believes that the entity is engaging in conduct that will impede an investigation.
- At least 120 days have elapsed since the whistleblower reported the information to his or her supervisor or the entity's audit committee, chief legal officer, chief compliance officer – or at least 120 days have elapsed since the whistleblower received the information, if the whistleblower received it under circumstances indicating that these people are already aware of the information.

Certain other people — such as employees of certain agencies and people who are criminally convicted in connection with the conduct — are already excluded by Dodd-Frank.

Under the final rules, the Commission also will not pay culpable whistleblowers awards that are based upon either:

- The monetary sanctions that such culpable individuals themselves pay in the resulting SEC action, or
- The monetary sanctions paid by entities whose liability is based substantially on conduct that the whistleblower directed, planned or initiated.

The purpose of this provision is to prevent wrongdoers from benefiting by, in effect, blowing the whistle on themselves.

Providing Information to the Commission and Seeking a Reward

The rules also describe the procedures for submitting information to the SEC and for making a claim for an award after an action is brought. The claim procedures provide opportunities for whistleblowers to fairly present their claim before the Commission makes a final award determination.

Under the final rules, the SEC also will pay an award based on amounts collected in related actions brought by certain agencies that are based upon the same original information that led to a successful SEC action.

Clarifying Anti-Retaliation Protection

Under the rules, a whistleblower who provides information to the Commission is protected from employment retaliation if the whistleblower possesses 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. In addition, the rules make it unlawful for anyone to interfere with a whistleblower's efforts to communicate with the Commission, including threatening to enforce a confidentiality agreement.

Supporting Internal Compliance Programs

The final rules do not require that employee whistleblowers report violations internally in order to qualify for an award. However, the rules strengthen incentives that had been proposed and add certain additional incentives intended to encourage employees to utilize their own company's internal compliance programs when appropriate to do so.

For instance, the rules:

- Make a whistleblower eligible for an award if the whistleblower reports internally and the company informs the SEC about the violations.
- Treat an employee as a whistleblower, under the SEC program, as of

the date that employee reports the information internally – as long as the employee provides the same information to the SEC within 120 days. Through this provision, employees are able to report their information internally first while preserving their “place in line” for a possible award from the SEC.

- Provide that a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award, and that a whistleblower’s interference with internal compliance and reporting is a factor that can decrease the amount of an award.

OFFICE OF THE WHISTLEBLOWER

In addition to whistleblower rules, the Dodd-Frank Act called upon the SEC to create an Office of the Whistleblower. That office, now headed by Sean McKessy, works with whistleblowers, handles their tips and complaints, and helps the Commission determine the awards for each whistleblower. The initial staffing of the office has been completed and the Investor Protection Fund, which will be used to pay awards to eligible whistleblowers, has been fully funded.