



WHISTLEBLOWER LAW ALERT

SEPTEMBER 20, 2011

SEC's Office Of The Whistleblower Begins Processing Tips: What Companies Should Do Now

Sean McKessy, Chief of the SEC's Office of the Whistleblower, and Mark Cahn, General Counsel for the SEC, recently outlined the Office of the Whistleblower's activities and priorities in public remarks. According to agency officials, as many as 100 tips per day are coming in from whistleblowers and their attorneys. This is not yet a dramatic increase since the implementation of the regulations, but SEC officials note that the quality of the complaints has improved significantly. The SEC will use its discretion as to whether to notify a company that an inquiry is the result of a whistleblower complaint or generated otherwise.

McKessy explained that the Office of the Whistleblower has now posted a [list of successful enforcement actions](#) on its website for which whistleblowers may be eligible for a bounty. Thus, whistleblowers who have provided tips to the SEC since the passage of the Dodd-Frank Act in July, 2010 can review the posted actions on the Office's website and begin claiming awards. There are 170 posted actions on the website so far, against both individuals and companies, with monetary sanctions ranging from just over the million dollar threshold for claiming an award into the hundreds of millions of dollars. McKessy anticipates that most of his Office's resources will be devoted to the award claims process.

Current priorities of the Office include internal and external outreach, developing policies, procedures, and best practices to implement the law and the regulations, and communicating with whistleblowers and their counsel to effectively answer any questions they may have and to assist them in preparing Form TCRs (the SEC's whistleblower tip questionnaires).

In terms of the SEC's handling of claims that arise from whistleblower tips, McKessy explained that his office will generally follow the SEC's standard intake and investigation process. Once a decision is made that a tip is worth investigating, the Office of the Whistleblower will leverage the expertise of the SEC's enforcement staff. There are, however, a few narrow differences from the standard process. First, the Office of the Whistleblower will take precautions to safeguard whistleblower identifying information and only share that information as permitted under the Dodd-Frank Act. Second, recognizing that some whistleblowers will eventually be seeking awards from the SEC, the Office will work with investigative staff to document, from the outset of a whistleblower tip, interactions with the whistleblower so that there is a record of the extent of the whistleblower's cooperation and the significance of the information provided by the whistleblower. This information is relevant when the agency

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determines the percentage of the award, which can range from 10-30% of the SEC's recovery where monetary sanctions exceed \$1 million. Third, the Office is giving thought to ways it can communicate with whistleblowers and their counsel during the investigative process, but for now it is operating under the traditional enforcement communications policies.

What Companies Should Do Now

Orrick is working with a number of its clients to take action now. Best practices include:

- Reviewing existing reporting and disclosure policies as well as policies against retaliation to encourage internal reporting, and incorporating those obligations in other documents such as deferred compensation arrangements.
- Publicizing the existence of and value of internal reporting in communications from the CEO or other senior management.
- Providing other opportunities for reporting that do not involve filing a regular complaint.
- Improving procedures and processes for receiving tips and promptly and thoroughly investigating them.
- Evaluating whether existing compliance and legal staff are adequate to meet the challenges of Dodd-Frank.
- Evaluating Board involvement in the review of whistleblower complaints.
- Delivering training programs to supervisors to be sensitive to comments from employees that might later be considered to have been complaints to ensure that complaints are handled properly.
- Updating the procedures and timelines for conducting investigations and the documentation, where appropriate, of investigations and outcomes.