

## Securities Litigation and Government Investigations ADVISORY

November 30, 2010

### SEC Issues Proposed Rule for Whistleblower Provisions of Dodd-Frank Act

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) was signed into law. Pub. L. No. 111-203. Among other things, the law included a provision establishing a program to pay an award to eligible whistleblowers who provide the Securities and Exchange Commission (the “Commission”) and/or other government authorities with original information that leads to successful enforcement of federal securities law violations that result in monetary sanctions in excess of \$1 million. *Id.* at § 922.

On November 3, 2010, the Commission issued its Proposed Rule for implementing the whistleblower provisions. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F, Exchange Act Release No. 34-63237, File No. S7-33-10 (Nov. 3, 2010) (to be codified at 17 CFR pts. 240 and 249). The Proposed Rule solicits comments through December 17, 2010. *Id.* Below is a summary of some of the relevant provisions of the Proposed Rule and the statute.

- **Whistleblower:** A whistleblower is any individual who provides the Commission with original information related to a potential violation of federal securities law. SEC Proposed Rule, 17 CFR § 240.21F-2(a).
- **Award:** Where all the conditions of the Proposed Rule are met, a whistleblower is entitled to between 10-30 percent of the total monetary sanctions collected in successful Commission or other actions. SEC Proposed Rule, 17 CFR § 240.21F-5. The size of the award is determined by the Commission after considering several statutory factors, including the significance of the information provided by the whistleblower to the success of the action and the degree of assistance provided by the whistleblower. *Id.* at § 240.21F-6.
- **Anonymity of Whistleblower:** Whistleblowers are entitled to remain anonymous. They must, however, be represented by an attorney and disclose their identity before collecting any award. SEC Proposed Rule, 17 CFR § 240.21F-7(b).
- **Compliance Officers:** Compliance officers and those with a pre-existing legal or contractual duty to report securities law violations are ineligible to collect the award, unless the company does not provide the information to the Commission within a reasonable time or acts in bad faith. SEC Proposed Rule, 17 CFR § 240.21F-4(a)(3) & (b)(4). Individuals and information ineligible for the award include:
  - Individuals under a “**pre-existing legal or contractual duty** to report securities violations.” SEC Proposed Rule, 17 CFR § 240.21F-4(a)(3) (emphasis added);
  - Information based on a communication that was subject to the **attorney-client privilege**. SEC Proposed Rule, 17 CFR § 240.21F-4(b)(4)(i);

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- Information gained as a result of legal representation. SEC Proposed Rule, 17 CFR § 240.21F-4(b)(4)(ii);
  - Independent public accountants performing duties required under the securities laws if the information relates to an engagement client or the client’s directors, officers, or other employees. SEC Proposed Rule, 17 CFR § 240.21F-4(b)(4)(iii);
  - Individuals with legal, compliance, audit, supervisory, or governance responsibilities for the company. SEC Proposed Rule, 17 CFR § 240.21F-4(b)(4)(iv)-(v); and
  - Information gathered in violation of federal or state criminal law. SEC Proposed Rule, 17 CFR § 240.21F-4(b)(4)(vi).
- **Eligibility for Award:** Employees may be deemed to provide “original information” and, therefore, qualify as whistleblowers if, after reporting the information internally, the employee provides the same information to the Commission within 90 days. SEC Proposed Rule, 17 CFR § 240.21F(b)(7).
  - **Reasonable Time and Bad Faith:** In the Summary of the Proposed Rule, the SEC states “we have included provisions in the proposed rules intended not to discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate company personnel, while at the same time preserving the whistleblower’s status as an original source of the information and eligibility for an award. At the same time, the proposed rules would not prohibit a whistleblower in a compliance function from reporting information to the Commission where the company did not provide the information to the Commission within a *reasonable time* or acted in **bad faith**.” SEC Proposed Rule, Summary, p. 4 (emphasis added). The Proposed Rule does not define reasonable time because it “will necessarily be a flexible concept that will depend on all of the facts and circumstances of the particular case.” *Id.* at 26.
  - **Whistleblower Protection:** Section 922 of the Dodd-Frank Act protects whistleblowers against retaliation from employers. Pub. L. No. 111-203, § 922 Sec. 21F(h). “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower” providing information to the Commission, initiating or participating in an action, or in making disclosures to the Commission. Pub. L. No. 111-203, § 922 Sec. 21F(h)(1)(A). This protection applies (i) regardless of whether the whistleblower procedurally qualifies for an award and (ii) even if it is ultimately determined that the conduct identified by the whistleblower does not constitute a violation of the securities laws. SEC Proposed Rule, 17 CFR § 240.21F-2(b).
  - **Statute of Limitations for Actions Against Retaliatory Employers:** A whistleblower may bring an action against an employer either six years after the date on which the retaliatory action occurred or three years after the date when the whistleblower becomes aware or should have become aware of the retaliatory action, but not later than ten years after the date of the retaliatory action. Pub. L. No. 111-203, § 922 Sec. 21F(h)(1)(B).
  - **Expanded Jurisdiction:** A whistleblower can bring a cause of action for retaliation in U.S. District Court. Pub. L. No. 111-203, § 922 Sec. 21F(h)(1)(B)(i). Previously, whistleblowers were required to file retaliation claims at the administrative level.
  - **Remedies of Aggrieved Whistleblower:** A whistleblower who is successful against an employer on a retaliation claim is eligible for reinstatement with the same seniority s/he otherwise would have had and can recover double back pay, litigation costs, and reasonable attorneys’ fees. Pub. L. No. 111-203, § 922 Sec. 21F(h)(1)(C).

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