

## If You See Something, Say Something!

### Editorial

With the Dodd-Frank Act the regulatory hot topic, we explore yet another facet of the legislation. While the Act is postured to significantly change the landscape of the US banking industry, much of the final rule outcomes have yet to be defined. As financial institutions grapple with what compliance entails, it's important to carefully examine each section of the reform to allow for mobilization at the drop of a hat.

**The Whistleblower Program embedded in the Act** underscores this necessity for preparedness. Companies will find it in their best interest to put infrastructures and procedures in place that encourage employees to report suspect activity internally rather than going directly to the SEC. The regulatory theme of transparency consequently resurfaces—companies will need to take measures to ensure clarity and accountability with regards to whistleblowing protocol.

Enjoy your read!

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## >> **Dodd-Frank's New Whistleblower Program: Greater Scope and Higher Incentives for Informants**

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Under Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) enacted on July 21, 2010, the Securities & Exchange Act of 1934 was amended to include a new Section 21F. As a result, the US Securities and Exchange Commission (SEC) became authorized to pay awards to whistleblowers of between 10% and 30% of successful enforcement actions where monetary fines exceed \$1 million. Previously, whistleblowers were limited as to the types of matters on which they might offer tips to the SEC, and rewards were capped at 10%. In addition, the Act provides whistleblowers with protections against employer retaliation.

On May 25, 2011, the SEC adopted rules to implement Section 21F as called for in the Act. This bounty program is viewed as a way for the SEC to obtain more high quality and timely tips in order to better leverage its resources in enforcing the Federal Securities laws. The program will have large implications for the banking industry given the significance of its involvement in adhering to securities regulations and the vast sums of money in banking activities.

### The Whistleblower Program

Under the program, a whistleblower is considered to be someone who voluntarily provides original information to the SEC that leads to an enforcement action being successfully consummated, resulting in more than a \$1 million fine. One does not qualify as a whistleblower if one volunteers information if first asked by an authoritative body such as a regulator or if the information provided is deemed to be public knowledge.

In order for the information supplied by a whistleblower to be considered to have led to a successful enforcement action, it must be specific, credible and timely. It also must significantly contribute to an investigation whether existing, new or reopened. A whistleblower has the option to report directly to the SEC, the company, or to both at the same time.

The new rules include a provision that calls for larger awards to be provided to whistleblowers who first report internally, thereby using existing compliance programs. If reported internally first, the whistleblower has 120 days by which time the SEC must be informed. In no case may a company agree with employees that only the company will report a matter to the SEC.

### Who Doesn't Qualify

Certain people are barred from awards in the final SEC rules. Those parties specifically excluded are:

- > People who obtain information in violation of US state or federal law
- > Foreign government officials
- > Attorneys who use information obtained from client engagements to make their own claims
- > Persons who are already obligated to report their information to the SEC
- > Officers, directors, trustees or partners of a company who learn about potential violations from others
- > Public accountants
- > Compliance and internal audit staff

In some cases, however, public accountants, compliance personnel and internal auditors can be deemed as whistleblowers if they believe that disclosure will prevent substantial injury to the company, that the organization is engaged in an activity which prevents an adequate investigation, and that 120 days have transpired since the whistleblower first reported the information or at the time he/she knew that responsible company management were aware.

Successful enforcement actions against multiple parties resulting from the same information provided by the whistleblower can be aggregated for purposes of determining a whistleblower award.

Furthermore, multiple individuals may share in an award as long as the total remuneration does not exceed 30% (although individual awards may be less than 10% as long as the total of two or more exceeds 10%).

If a whistleblower reasonably believes information being provided to the SEC concerns a potential securities law violation, he/she will be afforded protection from employer retaliation. It is also against the law to interfere with whistleblowers' attempts to communicate with the SEC, including confidentiality agreement enforcement.

A whistleblower alleging improper discharge or discrimination can seek relief which may include employment reinstatement at the same seniority status, two times the back pay plus interest and litigation cost compensation.

In addition to establishing the rules to implement the whistleblower program, the SEC has set up an Office of the Whistleblower and has funded the Investor Protection Fund from which awards are to be paid.

## Implications for Companies

The whistleblower program has a number of important implications for all companies and particularly for financial institutions. If bounties work for government agencies, then similar incentive programs within companies may also work effectively to detect matters earlier.

Companies will prefer and therefore encourage that tips are first referred to them internally (e.g. via a hotline) so that they may begin to manage investigations earlier, draw conclusions and direct action items.

However, internally reported cases will need to be managed by companies with a high level of impartiality and professionalism accorded to whistleblowers. In addition, they will have to complete the investigations in a timely manner, and communicate appropriately to various parties including the SEC.

In our view, companies will need to review and consider new procedures to respond to the whistleblower requirements. For example:

- > Does your internal policy address non-retaliation against whistleblowers?
- > Does your internal policy with respect to confidentiality of information require modification in light of the new whistleblower rules?
- > Does your company want to also provide incentives to employees to report internally?
- > Do you have a hotline? And if you do, does the hotline need to be modified to include a wider scope of reporting?
- > Does a more formal tracking and reporting of investigative matters need to be implemented?
- > Are there procedures that help to ensure that investigation roles are adequately independent from the whistleblower? Is the responsibility for an investigation clear and understood?
- > Does the company's education program include aspects related to the SEC's new whistleblower program?

We at OTC Conseil have a team of consultants with experience in addressing Dodd-Frank and related issues, and are available to help you meet implementation and adherence challenges to these new rules whether in financial services or across other industries ●

### What About Us?

*OTC Conseil is immersed in the Dodd-Frank Act, with practical experience through current engagements on the legislation's implications for the banking industry. One of the biggest challenges companies face is the fact that many of the rules contained in the Act are still undefined.*

*This presents a catch-22: compliance with Dodd-Frank demands significant preparation, but it's hard to take action when the finish line is so hazy. Since the regulation involves adapting each bank's business model, only once the model is revised can the operational impact (on processes, booking, reporting, systems, etc.) be truly assessed.*

*This is where we come in. With our in-depth knowledge of the Act, we assess each aspect of a bank's multifaceted business—from front to back office—and build weighted-probability scenarios based on all possible combinations of the final rule outcomes. Some of the most salient impacts will come from rules concerning the following:*

- > Clearing obligations
- > Swap-dealer registration
- > Cleared and non-cleared swaps
- > The push-out rule
- > Reporting

*Our specialty servicing clients that are American entities of French-headquartered organizations is particularly valuable, as much of the remaining uncertainty relates to recognition and registration of foreign institutions ●*

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