



**The Dodd-Frank Wall Street Reform
and Consumer Protection Act of 2010
Webinar Series**

Whistleblower Bounties: The SEC's New Proposed Rules

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Agenda

- Overview of Bounties & Retaliation Provisions
- Overview of Proposed Whistleblower Rules
- Facts and Take Aways

Overview of Bounties & Retaliation Provisions



Dodd-Frank Whistleblower Overview

- Section 922 of the Dodd-Frank Act greatly increases incentives for whistleblowers to report violations to the SEC
- These incentives significantly increase the risk that public companies will be the target of SEC investigations, and justify fresh scrutiny of compliance programs
- SEC already receiving reports under whistleblower program
- Proposed regulations attempt to balance competing SEC and Corporate interests



Enhanced Whistleblower Incentives – *Increased Eligibility*

- Expansion of violations eligible for awards
 - whistleblower bounties now available for all securities law violations, including violations of the Foreign Corrupt Practices Act
 - “any judicial or administrative action brought by the [SEC] under the securities laws”
 - the resulting monetary sanctions must exceed \$1,000,000



Enhanced Whistleblower Incentives – *Increased Size of Awards*

- Increased from a maximum of 10% to a *minimum* of 10%, and a maximum of 30%
- Exact percentage decided based on value of the information, cooperation of the whistleblower, and other relevant factors
- Proposed rules include internal reporting
- Enhanced percentage now to be applied to all monetary sanctions collected, both in the SEC’s action and in “related actions” (DOJ, state criminal actions, actions by self-regulatory organizations like stock exchanges)
- Judicial review only if percentage outside 10-30% range



Enhanced Whistleblower Incentives – *Increased Oversight*

- Previously, bounties could be awarded only in insider trading cases
 - bounty could not exceed 10% of civil penalties recovered
 - SEC had unreviewable discretion on whether and how much to award
 - according to 2010 SEC Inspector General report, since 1989, only \$159,537 had been awarded under SEC’s bounty program, to 5 people
- Now, SEC to report annually to Congress on its administration of the whistleblower program
- SEC’s Inspector General to provide a report within 30 months on the effectiveness of the program



Enhanced Whistleblower Incentives – *Increased Reporting*

- Easy submission procedures through SEC website or standardized forms
 - whistleblower must declare under penalty of perjury that information submitted is true and correct
- Reports may be made anonymously through an attorney
 - SEC may not disclose the identity of the whistleblower before payment of award, unless disclosure required in public proceeding
 - Attorney must certify identity and retain whistleblower's signed form



Anti-Retaliation Provisions

- Section 922 also protects whistleblowers from retaliation.
 - Private right of action in federal district court;
 - No administrative exhaustion;
 - Right to federal jury trial that is unwaivable even with pre-dispute arbitration agreement.
- Remedies include:
 - Reinstatement with equivalent seniority;
 - Two-times back pay with interest; and
 - Attorneys' fees and related costs.



Anti-Retaliation Provisions

- SOL for retaliation claim under Dodd-Frank is:
 - 6 years after the date the retaliation occurred; or
 - 3 years after discovering the retaliation as long as suit is filed within 10 years of the date the retaliation occurred.
- While SOX contains whistleblower provisions, they provide only defensive protections to whistleblowers and do not contain financial incentives for a person with information to come forward



Anti-Retaliation Provisions: *Proposed Rules*

- SEC is seeking comment on whether it should promulgate rules specific to anti-retaliation provisions
- Some current proposed rules impact companies' anti-retaliation policies
 - Anti-retaliation provisions apply to whistleblowers regardless of whether eligible for bounties
 - Cannot enforce confidentiality agreements to impede whistleblower from communicating with SEC

Overview of Proposed Whistleblower Rules



Definition of Whistleblower – Rule 21F-2(a)

- An individual who, alone or jointly with others, provides information to the SEC relating to a *potential* violation of the securities laws
- Includes Foreign Corrupt Practices Act
- Word “potential” added because determining whether a person is a “whistleblower” must be determined at the time he or she provides information to the SEC
- Only natural persons, not companies, are entitled to obtain a whistleblower award

“Voluntary” Submission – Rule 21F-4(a)

- A submission is “voluntary” only if a whistleblower provides the SEC with information before receiving any formal or informal request, inquiry or demand from the SEC, Congress, any other federal, state or local authority or the PCAOB
- Information submitted after an SEC staff informal request will not be considered “voluntary”
- A request, inquiry or demand that is directed to an employer is also considered to be directed to employees who possess the documents or other information that is within the scope of the request to employer
- List of authorities does *not* include an employer’s legal counsel, compliance or audit staff conducting an internal investigation
- Therefore, a whistleblower “voluntarily” provides information if he or she approaches the SEC after being questioned about a potential violation by an employer’s personnel (unless it is after and within the scope of a request, inquiry or demand directed at the employer)



“Voluntary” Submission – Rule 21F-4(a)

- Disclosure is not considered “voluntary” if the individual has a clear duty to report violations of the type at issue
- No awards to employees of regulatory agencies, the Dept. of Justice, a self-regulatory organization, the PCAOB or law enforcement
- No awards to persons who obtain their information as a result of an audit of financial statements and would be subject to Section 10A of Exchange Act
- May be other similarly-situated persons who are under a pre-existing legal duty to report potential violations to the SEC or other authorities



“Original Information” – Rule 21F-4(b)

- Derived from the whistleblower’s independent knowledge or analysis
- Is not already known to the SEC from any other source (unless the whistleblower is the original source)
- Is not exclusively derived from an allegation made in a judicial or administrative hearing (includes hearings in arbitration proceedings), in a government report, hearing, audit or investigation or from the news media (unless the whistleblower is the original source)



“Original Information” – Rule 21F-4(b)

- “Independent knowledge” is factual information in the whistleblower’s possession that is not obtained from publicly available sources, which may include widely disseminated sources or other sources generally available to the public, such as FOIA requests or court filings
- Whistleblower does *not* have to have direct, first-hand knowledge of potential violations
- “Independent knowledge” may be derived from facts or other information conveyed by third parties



“Original Information” – Rule 21F-4(b)

- “Original information” may include information derived from independent analysis, which would mean the whistleblower’s own analysis, whether done alone or in combination with others
- “Analysis” – the whistleblower’s examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public



“Original Information” – Exceptions

- 1) Information obtained through a communication subject to attorney client privilege (does not apply where the attorney is permitted to disclose the substance of a communication that is otherwise privileged)
- 2) Information obtained as a result of the legal representation of a client on whose behalf the whistleblower’s services, or the services of the whistleblower’s employer, have been retained (includes information obtained from an opposing party in litigation for a submission on the attorney’s own behalf)



“Original Information” – Exceptions (cont.)

- 3) Information obtained through the performance of an engagement required by the securities laws by an independent public accountant (if related to a violation by the client or its directors, officers or other employees but not a violation by the accounting firm itself)

“Original Information” – Exceptions (cont.)

- 4) Information obtained by a person with legal, compliance, audit, supervisory or governance responsibilities for the issuer and the information was communicated to such person with the reasonable expectation that the person would take appropriate steps to cause the entity to respond to the violation
- 5) Information obtained from or through an entity’s legal, compliance, audit or similar functions for identifying, reporting and addressing potential non-compliance with securities laws
 - ❖ Exceptions 4 and 5 cease to be applicable if the entity does not disclose the information to the SEC within a “reasonable” time *or* if the entity proceeds in bad faith (“reasonable” is not defined, but will be determined on a facts and circumstances basis)

“Original Information” – Exceptions (cont.)

– Recap of Exceptions Four and Five:

Source of Employee’s Knowledge	Does it Qualify as “Independent Knowledge”?
Employee receives information because he/she is reasonably expected to take appropriate steps to respond to the violation because of legal, compliance, audit or supervisory responsibilities	Employee will <i>not</i> be deemed to have independent knowledge <i>unless</i> (1) the entity did not disclose the violation to the SEC within a “reasonable” period of time or (2) acts in bad faith
Employee learns of information through company’s legal, compliance, audit or similar functions for identifying or addressing non-compliance with laws	Same as above
Employee otherwise lawfully learns of information through work-related functions	Employee will generally be deemed to have independent knowledge of the information (note: if report is made internally first, employee receives a “90-day look-back” for subsequent submission to the SEC)



“Original Information” – Exceptions (cont.)

- 6) Information obtained by a means or in a manner that violates applicable federal or state criminal law
- 7) Information obtained from persons subject to the first six exclusions



“Original Information” – Rule 21F-4(b)

– “Original Source”

- A whistleblower is an “original source” of the same information that the SEC obtains from another source if the other source (such as the DOJ) obtained the information from the whistleblower or his or her representative
- Whistleblower bears the burden of establishing that he or she is the “original source”
- Whistleblower has 90 day grace period to submit proper forms to the SEC



Use of Internal Processes – Rule 21F-6

- SEC expects that, in appropriate cases, consistent with the public interest and the SEC’s obligation to preserve the confidentiality of the whistleblower, the staff will, upon receiving a whistleblower complaint, contact the company, describe the nature of the allegations and give the company the opportunity to investigate the matter and report back



Staff Communications with Whistleblowers – Rule 21F-16

- SEC may communicate directly with whistleblowers who are directors, officers, members, agents or employees of an entity that has counsel without first seeking the consent of the entity’s counsel
- ABA Model Rule 4.2 allows for contacts with represented persons without the consent of the person’s lawyer if *authorized by law*; every state bar ethics rules has some variation of the same exception
- Rule 21F-16 purports to make the SEC’s communications with whistleblowers “authorized by law”

Facts and Take Aways



Facts

- In 2007, whistleblowers fingered 43% of white-collar crimes committed at more than 5,400 companies worldwide versus only 19% unearthed from internal audits
- Disgruntled employees are the most common whistleblowers



Minnows to Whales

- Commission Disputes ⇒ Revenue Recognition, Dodd Frank, SOX, FCPA and PAGA
- Customer Collection Anomalies ⇒ Dodd Frank, FCPA and 10b5
- Troublemaker ⇒ False Claim Act, SOX, NLRA, McCaskill Amendments, State and Federal Whistleblower Acts
- Product or Workplace Safety ⇒ host of whistleblower statutes



The Essential Ingredients of Corporate Compliance

Leadership

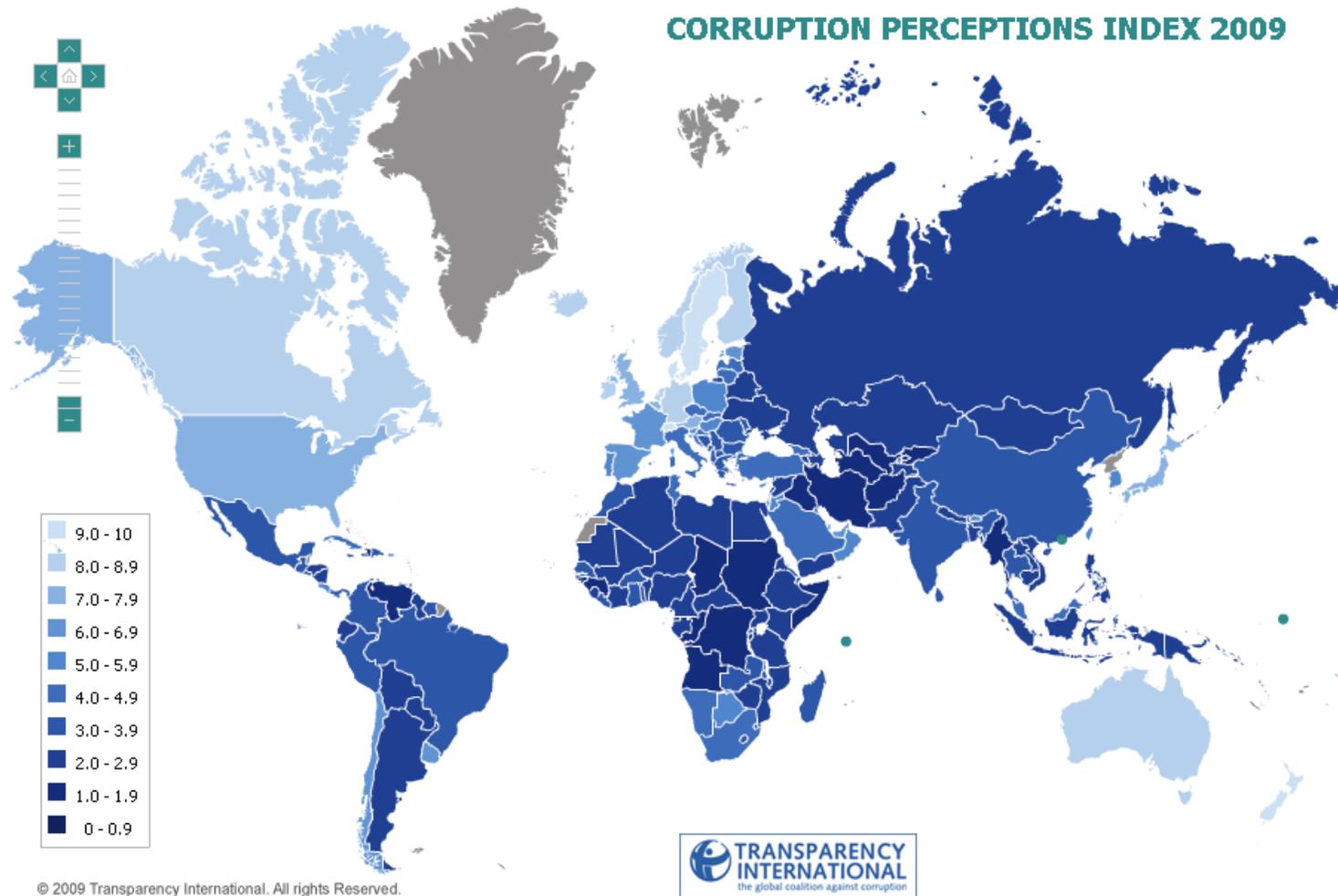
Risk Assessment

Standards and Controls

Training and Communication

Monitoring, Auditing and Response

Compliance in the Global Workplace





Standards and Controls

- Don't Be US-Centric if operating internationally
- Maintain credibility in your ability to enforce
- PLAN AHEAD to position the company to:
 - Investigate as quickly and thoroughly as possible
 - Its not just about the drafting the policies/Code
 - Get your data privacy house in order
 - Ensure that required employment consultation and implementation steps have occurred
 - Have clear understanding of record retention, litigation hold and data management in place before whistle blows
 - Take lawful remedial measures and discipline



Training and Communication: Living Compliance

- Train Managers and HR to recognize the whale
- Electronic versus Live Training
- Targeted training
- Embedded into Culture
- Good Corporate Citizenship
- Truly Open Doors
- Nipping in the Bud
- Maintaining Credibility
- Petting the watchdogs rather than muzzling them



Monitoring, Auditing and Response

- Best practices in the US may not be best practice globally
- Understand data privacy restrictions before monitoring or requiring reporting or self-certifications internationally
- Be conscious of possible lack of in house attorney-client privilege internationally in internal investigations or auditing
- Be sensitive to settlement and release language or appearances of hush money or obstruction
- Self-disclosure and cooperation strategies

Thank you.

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