

# Lenders Compliance Group

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## Whistleblowers and Bounty Hunters

Americans have often had an ambivalent view of whistleblowers. When we feel that the whistleblowing serves some righteous cause, the whistleblower's actions are worthy of a medal; but when the whistleblower's cause is considered to mask self-aggrandizement, then we often contend that some jail time might be a more suitable reward, whatever the cause. Still, one person's justification for such actions may be castigated by another person as an act of perfidy.

In a rather morally twisted way, recent law has combined the act of whistleblowing with the remuneration of bounty hunting, the latter being yet another concerning happenstance of American ambivalence.

Let's call this new ethical imperative the "Dope for Dough" compact.

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### A Snitch In Time Saves Crime

Being a snitch is not exactly the kind of job position somebody must apply for, even in these days of high unemployment. It's not a career opportunity. A snitch doesn't want to be a snitch, hates snitching, and would rather not have to snitch at all. Being a snitch does not bestow a badge of honor! There are no annual conferences for snitchers. A snitch is not born a snitch; something has to happen to make a snitch snitch.

Often, the stakes for snitching are very high. Being a snitch means subjecting oneself to potential ostracism, being fired, not being hired, jail time, and even community time (yes, courts have held that "community service" may be a proxy for prison time). Snitchers know that whenever people pass them by, there will be fingers pointed at them and breathless whispers behind their backs about the supposed damage done by, or the great good achieved through, their snitching. Snitching has a wake all its own and the snitcher can never get out of it, whatsoever the tattletale tattled.

The list of snitch martyrdom is long and, depending on the results and society's comfort zone, contains patriots and traitors, saints and the damned, reformists and reactionaries, the sempiternal loyalists and the double-crossing turncoat. Even if the weaseling betrayer squeals the unvarnished truth, the very act of making manifest the heretofore hidden may bring with it many dangers impinging on the tipster's physical, let alone social, survival.

### If You See Something, Say Something!

We constantly hear, "if you see something, say something." Implied in that statement is the moral judgment that we do know when something is wrong and when something is right, and, knowing that difference, when we know something wrong is happening, we should share such knowledge with somebody else. The phrase does not say, "if you see something, say something, and if you do we'll pay you for the information." It does not say, "if you see something, say something, but if you do you will put yourself and perhaps all of your loved ones at personal risk." And it does not say, "if you see something, say something, but if you do you may go to jail or you may not." Finally, it does not say, "if you see something, say something, though if you do we will ignore what you have to say and nobody will ever know something wrong happened."

The instinct for self-preservation is strong. Especially strong in a stoolie! This is obviously why [a recent study](#) shows that 78 percent of Americans said they would report something wrong only if they could be anonymous informants, be assured of evading retaliation, and nevertheless get a reward for information. whether such information was pilfered, pinched,

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performed, or professed.

Pity the poor snitch! So misunderstood, often the butt of ridicule, and only occasionally appreciated for the grumbling sacrifice of life and liberty. But now a new era of gratitude, tribute, and prestige has begun for the deep throated canary that yearns to sing.

### Welcome to the Office of the Whistleblower

Henceforth, we will need to replace the term snitch with a new title, the "whistleblower," and appoint an overseer to protect the whistleblower's rights, prevent retaliation, and offer remuneration for blowing the whistle and assisting with any investigation or judicial or administrative action that follows from the information thereby obtained.

Section 924(d) of the Dodd-Frank Act (Dodd-Frank) directs the Security and Exchange Commission (Commission) to establish a separate office within the Commission to administer and to enforce the Section 21F provisions of the Securities Exchange Act of 1934 (Exchange Act). On February 18, 2011, the Commission appointed an overseer or Chief, Sean X. McKessy, to head the newly-created [Office of the Whistleblower](#) in the Division of Enforcement (Whistleblower's Office). Chief McKessy is looking for a Deputy Chief, and there are several attorneys among the staff.

The ostensible purpose of the Whistleblower's Office is to provide assistance to a whistleblower who knows of possible securities law violations, such as identifying possible fraud and other violations, much earlier than might otherwise have been possible. The result, presumably, will be to minimize the harm to investors, preserve confidence in capital markets, and hold accountable those responsible for unlawful conduct.

### Bounty Hunter

For remunerating the whistleblower, the Commission is authorized by Congress to provide monetary awards to eligible individuals who come forward with "high-quality original information" that leads to a Commission enforcement action in which over \$1,000,000 in sanctions is ordered. The range for awards is between 10% and 30% of the monetary sanctions collected (which I will term the Bounty Fee).

This Bounty Fee of 10% to 30% is particularly robust, compared to the usual 10% (or less) of bail collected these days by bounty hunters. Of course, the whistleblower's Bounty Fee is not quite the same as the fee paid to a bounty hunter for capturing a fugitive outlaw. Bounty hunters are usually employed by bail bondsmen. But there is, shall we say, a resemblance.

In any event, the whistleblower's information must be provided voluntarily, which means it must be given before the Congress, or a regulatory or enforcement agency requests it or asks for the information in connection with an investigation or certain examinations or inspections. It's hard to determine what is meant by "high-quality original information" but it likely means independent knowledge (facts known to the whistleblower that are not derived from publicly available sources) or independent analysis (evaluation of information that may be publicly available but which reveals information that is not generally known) that is not already known by the aforementioned governmental entities.

If the whistleblower believes that reporting information internally is a problem, the Whistleblower's Office has a solution. Although internal reporting is not required to be considered for an award, the whistleblower may be eligible for an award for information reported internally if the whistleblower also reported the information to the Whistleblower's Office within 120 days of reporting it internally. The scrutiny for "original information" will then take place and investigation will be conducted. If such information is considered useful, the range provided in the Bounty Fee will then be considered.

### Tips, Complaints and Referrals

There's even a form for the whistleblower. In order to qualify for an award under the whistleblower program, the whistleblower submits information either through an online Tips, Complaints and Referrals questionnaire or by completing a hardcopy Form-TCR and mailing or faxing it to the Whistleblower's Office. And anonymity is available, as well, if the whistleblower has attorney representation and the Form-TCR is submitted.

### Anonymity More-or-Less

Unfortunately, total anonymity is not actually possible, but it's perhaps better than nothing. The Whistleblower's Office will not disclose the whistleblower's identity in response to requests under the Freedom of Information Act.

But, in an administrative or court proceeding it may be required to produce documents or other information which would reveal the identity, and, as part of ongoing investigatory responsibilities, it may use information provided by the whistleblower during the course of its investigation.

Furthermore, in certain circumstances, the Whistleblower's Office may also provide information, subject to confidentiality requirements, to other governmental or regulatory entities.

### Preventing Retaliation More-or-Less

If an employer retaliates against the whistleblower, for instance discharges, demotes, suspends, harasses, or in any way discriminates against the whistleblower, a private action may be brought in federal court against the employer. If the whistleblower prevails, remedies include reinstatement, and payment of double back pay, litigation costs, expert witness fees, and attorneys fees.

The Commission can also take legal action in an enforcement proceeding against any employer who retaliates against a whistleblower for reporting information to it. This redress covers the whistleblower for any lawful act done by the whistleblower in providing

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information to the Whistleblower's Office under the whistleblower program or assisting in any investigation or proceeding based on the information submitted.

In fact, under the Sarbanes-Oxley Act, the whistleblower may be entitled to file a complaint with the Department of Labor if there is retaliation for reporting possible securities law violations, including making internal reports to the employer.

### First Do No Harm

An organization can foster a culture of transparency and dignified responsibility rather than encouraging a tribal mentality. The era of the whistleblower has arrived, and with its advent there is an obligation to be alert to incompetence parading as misguided loyalty, thwarting information about unlawful conduct. Whistleblowers are now incentivized by a monetary award to come forward, their anonymity guarded, and retaliation against them protected.

Compliance departments, risk management professionals, outside and inside counsel, need to focus immediately on internal reporting procedures for whistleblowers, recognizing the key areas where whistleblowers are likely to report information.

And, most of all, each employee should be told "if you see something, say something."

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