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SEC Adopts Rules Implementing the Whistleblower Provisions of Dodd-Frank

On May 25, 2011, the Securities and Exchange Commission (SEC) adopted rules to implement the whistleblower and anti-retaliation provisions of Section 21F of the Securities Exchange Act of 1934, which was added by Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). Consistent with Dodd-Frank and the proposed rules, the final rules provide that individuals who voluntarily provide the SEC with original information relating to a possible violation of federal securities laws in accordance with procedures established in the final rules, which leads to the successful enforcement by the SEC of a federal court or administrative action in which it obtains monetary sanctions totaling more than $1 million, are entitled to an award equal to between 10% and 30% of the amount collected. Smaller actions arising from the same "nucleus of operative facts" will be aggregated for purpose of reaching the $1 million threshold and determining an award and, consistent with the proposed rules, the SEC may also pay an award based on amounts collected in certain related actions. The SEC will determine the percentage amount of an award based on factors enumerated in the rules and the adopting release.

The final rules provide procedures for submitting information to the SEC (including anonymously though counsel), including a simplified process via a single form (instead of the proposed two forms) that can be filed on-line, by fax or by regular mail, and for making a claim for an award. They also refine the classes of persons ineligible for an award, including attorneys and others that provide information in violation of the attorney-client

privilege, officers and directors informed of alleged misconduct, employees with audit or compliance responsibilities, third parties engaged to perform compliance or internal audit work, and accountants performing an audit required under federal securities laws, with certain exceptions, including if the whistleblower reasonably believes that disclosure to the SEC is necessary to prevent "substantial injury to the financial interest or property of the entity or investors" or the company is engaging in conduct that will impede an investigation.

The final rules enhance the related anti-retaliation provisions, protecting whistleblowers if their tip relates to "possible" violations and regardless of whether there is a successful enforcement action or the whistleblower is entitled to an award, although the whistleblower must have a "reasonable belief" that there was a violation in order to be protected. The final rules also prohibit interfering with a whistleblower's efforts to communicate with the SEC, "including enforcing, or threatening to enforce, a confidentiality agreement."

Unfortunately, like the proposed rules the final rules do not require employee whistleblowers to first report potential violations though their company's internal compliance program in order to qualify for an award. The final rules do, however, strengthen the incentives that had been proposed and add new incentives for employees to use internal compliance programs when appropriate, including making employee whistleblowers eligible for an award if they report their concerns internally and the company reports that information to the SEC and listing a whistleblower's use of internal compliance and reporting systems as a factor that can increase the amount of an award. In addition, consistent with the proposed rules, the final rules preserve a potential whistleblower's status as the "original source" of the information, and therefore still eligible for an award, if he or she provides the information to the SEC within 120 days (increased from the proposed 90 days) of reporting it internally. Representative Michael Grimm (R-N.Y.), however, has introduced legislation that would make prior internal reporting mandatory in order to be eligible for an award.

The final rules are effective 60 days after the rules are submitted to Congress or published in the Federal Register. As we noted in our second November 2010 Bulletin discussing the proposed whistleblower rules, companies need to consider what improvements to their internal compliance processes, in particular the manner in which such processes operate in practice, may be necessary or appropriate in light of the final rules. As noted, the final rules do not mandate that whistleblowers first report potential violations through their company's internal procedures. Such reporting, however, is to a company's advantage as a company will always be in a better position when it learns of potential illegal behavior before the SEC does. As we noted in our November Bulletin, a payoff under the final rules is far from guaranteed and being a whistleblower entails significant potential drawbacks as well, therefore companies should leverage this to ensure that company personnel who become aware of potential violations will report them to the company, rather than to the SEC,

first. We believe that employees generally will be more likely to report potential violations internally, rather than going directly to the SEC or other law enforcement entities, if they believe that their concerns will be taken seriously, that the company will take appropriate follow-up action, and that they will not be subject to harassment or other forms of retaliation for reporting such potential violations. As a result, you should make sure you have an adequate and robust internal compliance system and anti-retaliation policy in place, that employees are adequately aware of these policies and procedures (and, if not, consider training), and that management is setting an appropriate "tone at the top" with respect to these matters. In addition, the final rules apply to all violations of federal securities laws, not just violations by public (i.e. SEC reporting) companies. As a result, they would cover violations by private companies, for example, in connection with raising capital in a private placement, as well as employees of non-public subsidiaries of public companies (unlike the currently applicable whistleblower/anti-retaliation provisions of the Sarbanes-Oxley Act). Therefore, you should ensure that your internal compliance and reporting procedures and practices are adequate throughout your entire organization, whether your company is private or public.

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About Me. I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio www.ober.com/attorneys/penny-somer-greif.

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any questions about the information in this Bulletin or would like additional information with respect to these matters, please contact me at 410.347.7341 or via e-mail at psomergreif@ober.com.

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