Blowing the Whistle: New SEC Rules Set the Stage for Increased Reporting of Potential Securities Law Violations

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On May 25, 2011, the Securities and Exchange Commission ("SEC") adopted rules to implement the whistleblower program called for under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] The rules, which became effective on August 12, 2011, are likely to impact thousands of companies throughout the United States. This article discusses who is eligible for a whistleblower award; incentives for whistleblowers to report to the SEC; liability issues for companies accused of retaliation; and the special impact the rules may have on broker-dealers and the financial services firms that own them. We conclude by providing ideas for developing "smart" compliance programs, *i.e.*, compliance programs designed for employers *and* employees.

Award Eligibility and Incentives

By way of background, the first thing to note about Dodd-Frank's whistleblower provisions and the SEC's rules implementing those provisions is their goal: the legislation and the SEC's rules are designed to motivate employees of companies that must comply with the securities laws to tip the SEC regarding possible securities laws violations by their employers. The incentives take two forms: monetary awards and job protection. Dodd-Frank authorizes the SEC to pay whistleblowers an award of not less than 10 percent and no more than 30 percent of all collected monetary sanctions resulting from an SEC enforcement action.[2] In addition to this financial incentive, would-be whistleblowers can tip without fear of impact to their job status because Dodd-Frank gives employees a private right of action against their employers for any suspected retaliation. Thus, the stage is set for increased reporting by employees to the SEC, and a need for employers to proactively manage the issues created by this reporting.

Whistleblower Eligibility Requirements

The SEC rules implement the Dodd-Frank whistleblower provisions by establishing who is eligible to collect an award from the SEC and the process by which they can tip the SEC and apply for an award. Simply stated, the SEC may pay an award to a whistleblower who *voluntarily* provides the SEC with *original information* that leads to a *successful enforcement action* by the SEC in which the SEC obtains monetary sanctions totaling *more than $1,000,000*.[3] The italized terms are significant because they are intended to exclude certain persons from collecting an award.

A Whistleblower's Submission of Information Must be Voluntary

A whistleblower's tip to the SEC must be voluntary in order for the whistleblower to be eligible for an award. This requirement seems straightforward but can require quick action on the part of the whistleblower. If a whistleblower only provides information to the SEC *after* receiving a request, inquiry, or demand relating to the subject matter or his or her submission from the SEC or certain other authorities, the whistleblower will not be eligible to receive an award. For example, if an employee of Company A receives a request for information from the SEC, the Public Company Accounting Oversight Board ("PCAOB"), a self-regulatory organization such as FINRA, Congress, a federal government agency, or a state Attorney General, before tipping the SEC, the employee's information will not be considered voluntarily provided to the SEC.[4]

A Whistleblower Must Provide Original Information

Whistleblowers must provide original information to the SEC. To be "original", the information must be: (1) derived from the whistleblower's independent knowledge or independent analysis; (2) previously unknown to the SEC from any other source; (3) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media; and (4) provided to the SEC for the first time after July 21, 2010 (the date of enactment of Dodd-Frank).[5] Importantly, the SEC rules place limitations on the sources from which a whistleblower can draw independent knowledge or independent analysis. Generally, information obtained during the course of a fiduciary relationship will not be considered to be derived from a whistleblower's independent knowledge or analysis. For example, information a potential whistleblower receives through a communication subject to the attorney-client privilege is not original information. Information obtained by an officer, director, trustee, or partner of an entity who receives allegations of misconduct from another person, or who learns of the misconduct through the entity's internal reporting mechanisms is not original information. The same is true with respect to an employee whose principal duties involve compliance or internal audit responsibilities, including employees of outside firms that are retained to perform compliance or internal audit work for an entity, and persons who are inside or outside auditors, or employees of a public accounting firm.[6] Information obtained from people acting in these capacities can form the basis for their independent knowledge or analysis in certain situations, however, including if they believe that disclosing the information to the SEC is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interests or property of the entity or investors, or they have reason to believe that the entity is impeding an investigation of the misconduct.[7]

This brings us to one of the more controversial aspects of the SEC's rules, which is the fact that the rules do not require employees to report their suspicions first to their employer, before tipping the SEC. Although the SEC heard from many commenters who advocated for a strict prohibition against employees bypassing company internal reporting programs, the SEC ultimately decided upon a compromise that makes the above described persons, who would otherwise be ineligible for whistleblower status, eligible for an award if such a person provides the information to his or her employer's audit committee, chief legal officer, chief compliance officer or their equivalent or to his or her supervisor and then tips the SEC within 120 days of providing the information to the employer. Accordingly, employees may elect to bypass internal reporting mechanisms and go directly to the SEC because of the potential for a significant monetary award, or simply because an employee has misinformation or a lack of information on internal reporting mechanisms, or a lack of trust in internal compliance regimes.[8] Certain persons, however, as described above, typically need to report internally first in order to be eligible for an award.

The Whistleblower Must Provide Information that Leads to a Successful Enforcement Action

A whistleblower's original information must lead to the SEC's successful enforcement of a judicial or administrative action. Here, there are three possibilities. First, a whistleblower can give the SEC original information that is sufficiently specific, credible, and timely to cause the SEC to commence an investigation and bring a successful action. Second, a whistleblower can provide the SEC with original information about conduct that is already being investigated either by the SEC or some other authority that significantly contributes to the success of the action. Third, a whistleblower can report original information through his or her employer's internal compliance procedures at the same time the whistleblower provides the information to the SEC; in this third scenario, if the employer later self-reports the conduct at issue to the SEC and the SEC brings an enforcement action, the whistleblower will be deemed to have tipped the SEC on the date of its own tip to the SEC, not the date of the employer's self-reporting to the SEC.

The SEC Must Obtain Monetary Sanctions Totaling More Than $1,000,000

The sanctions in the SEC action must exceed $1,000,000. For this purpose, monetary sanctions are defined as any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund.[9] The SEC will aggregate two or more smaller actions that arise from the same facts for purposes of determining whether the monetary threshold has been met (thus making whistleblower awards available in more cases). Whistleblowers are eligible for an award from 10 to 30 percent of the monetary sanctions the SEC imposes in actions brought as a result of the whistleblower's information.[10] How much a whistleblower receives as an award is left to the discretion of the SEC.[11]

Liability Issues

Anti-Retaliation

Any employer who is subject to the federal securities laws needs to be aware of Dodd-Frank's anti-retaliation provisions and the SEC rules that implement these provisions. Section 922 of Dodd-Frank prohibits an employer from discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against a whistleblower in the terms and conditions of employment because of any lawful act done by a whistleblower, *e.g.,* providing information to the SEC or assisting the SEC with an investigation. Any person who alleges discrimination under section 922 may bring an action in district court. If the individual is successful in district court, his or her relief shall include re-instatement with the same seniority status, 2x the amount of back pay with interest, and compensation for litigation costs, expert witness fees and reasonable attorney fees. The SEC may bring its own action against an employer for violation of the anti-retaliation provisions, thus opening up the employer to even more litigation.

The rights and remedies provided for in Dodd-Frank may not be waived by any employment agreement, policy form or condition of employment, including by a pre-dispute arbitration agreement, and no pre-dispute arbitration agreement is valid or enforceable if the agreement requires arbitration of a dispute arising Dodd-Frank's whistleblower provisions. The SEC rules that implement Dodd-Frank's anti-retaliation provisions require a whistleblower to possess a "reasonable belief" that the information he or she is providing to the SEC relates to a possible securities law violation.[12] The SEC s stated that the "reasonable belief"

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requirement is intended to "strike an appropriate balance between encouraging individuals to provide high-quality tips without fear of retaliation, on the one hand, while not encouraging bad faith or frivolous reports, or permitting abuse of the anti-retaliation protections, on the other."[13] Accordingly, whistleblowers who ultimately may not qualify for a whistleblower award are protected by the anti-retaliation provisions.

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A whistleblower is defined as someone who, alone or jointly with others, "provides the Commission with information . . . relat[ing] to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur."[14] As a result, essentially anyone other than those expressly excluded can be a whistleblower and seek a reward.[15] Potential whistleblowers include: (1) employees, (2) agents, (3) independent contractors, (4) consultants, (5) joint venture partners, (6) suppliers, and (7) any person involved with a private or public subsidiary.

As a result, companies are subject to whistleblowing by a wide spectrum of individuals, especially those who have access to sensitive information. For an operating company, this could entail whistleblowing by management, compliance and internal auditing personnel, employees, members of subsidiaries, investors, suppliers, purchasers, distribution agents, and the general public. An investment company may be subject to additional whistleblowers, such as portfolio companies and valuation agents. As a result, most companies must prepare for whistleblowing from all angles by a variety of actors. It is unclear, however, whether all of such actors will be protected by the anti-retaliation provisions. For example, a whistleblower who is not an employee of a company disciplined by the SEC may have reasons for claiming the protection afforded by the anti-retaliation provisions but such person's status under those provisions may not be clear.

Regulatory Overlap for Broker-Dealers

Many companies required to comply with U.S. federal securities laws have an SEC-registered broker-dealer within their holding company structure. These companies and their broker-dealers are subject to one of the special consequences of the SEC's whistleblower rules: the regulatory overlap between FINRA self-reporting requirements and incentives created by the SEC rules for employees to report their allegations to as many regulators as possible. As discussed below, new FINRA Rule 4530 adds to the matrix of factors that companies need to consider if the company itself is registered as a broker-dealer or has a broker-dealer within its holding company.[16]

FINRA Rule 4530 became effective on July 1, 2011. It contains a self-reporting requirement not formerly found in predecessor rules.[17] As of July 1, broker-dealers are required to report to FINRA any time they conclude that the firm or persons associated with the firm have violated any securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organization. Rule 4530 also requires broker-dealers to report to FINRA conduct that the firm "*reasonably should have concluded*" violated one of the cited areas of law, thus preventing broker-dealers from asserting a defense to self-reporting by claiming that the broker-dealer had not "concluded" that a violation had occurred. These self-reporting obligations arise with respect to conduct of associated person(s) that has widespread or potential widespread impact to the broker-dealer, its customers or the markets, conduct that has a significant monetary result for a broker-dealer, customers or markets, or multiple instances of any violative conduct.[18] If the potentially violative conduct was engaged in by the broker-dealer itself (as opposed to a bad act committed by one of the broker-dealer's associated persons), the broker-dealer must self-report conduct that has widespread or potential widespread impact to the member, its customers or the markets, or conduct that arises from a material failure of the broker-dealer's systems, policies or practices involving numerous customers, multiple errors, or significant dollar amounts.[19]

When considered alongside the SEC's whistleblower rules, FINRA Rule 4530 raises several interesting issues for broker-dealers separate and apart from the issue of whether particular conduct may need to be reported to FINRA. For example, assume a broker-dealer decides that it has an obligation to report a violation of the federal securities laws under Rule 4530. Should it also report the conduct to the SEC? At the same time it reports to FINRA? As noted earlier in this article, the SEC's whistleblower rules arguably create a 120-day window in which a company can decide to self-report to the SEC and not be particularly damaged by an employee's self-reporting to the SEC of the same conduct. This 120-day period can be extremely valuable to a company in terms of giving it time to investigate the conduct and learn as much as possible about the conduct prior to approaching the SEC. FINRA Rule 4530, however, provides a more limited investigative window; it requires broker-dealers to self-report within 30 calendar days of the broker-dealer concluding that a violation of applicable rules or laws has occurred or within 30 calendar days of when a reasonable person would have concluded that a reportable violation has taken place.[20] Accordingly, broker-dealers may find themselves in the position of having very little time to conduct an internal investigation, and, at the same time, very little time in which to decide whether the conduct they report to FINRA should also be reported to the SEC.

A complicating factor in this analysis is that the SEC's whistleblower rules arguably incentivize potential whistleblowers to report to as many regulators as possible. Under the SEC rules, a whistleblower award can be based on the amount collected in an SEC enforcement action but the award may also be based on any "related proceeding." A related proceeding must be based on information that the whistleblower provided to the SEC and the related proceeding must be brought by a self-regulatory organization (such as FINRA), the Department of Justice, an appropriate regulatory authority or a state attorney general.[21] Thus, a whistleblower may feel financially incented to report to the SEC and then to FINRA, while the company employing the whistleblower may simply be required to report to FINRA.

As a practical matter, broker-dealers will need to adopt written policies and procedures in order to deal with the competing demands of FINRA Rule 4530 and the SEC's whistleblower rules. Such policies and procedures should include some mechanism pursuant to which the broker-dealer gives prior notice to its parent company before self-reporting pursuant to Rule 4530.

Smart Compliance for Employers

Human Resource and Employment Implications

The changes occasioned by Dodd-Frank's additions to the federal whistleblower laws raise significant concerns for companies in their capacity as employers. To avoid the disruption and defray the costs of increased whistleblowing activity, companies need to shore up their internal compliance and reporting programs. Achieving that goal requires a consistent and, in some respects, aggressive approach to a company's policies on employee misconduct and potential violations of the securities laws. At the same time, the penalties for retaliating against employee whistleblowers are steeper than ever. The challenge is thus to find a balance between two competing priorities: addressing potential compliance problems internally, on one hand, and avoiding exposure to retaliation liability on the other.

Improving Internal Compliance

One of the best ways to reduce the likelihood of violations that could attract the attention of a whistleblower is to encourage employee participation in a company's internal compliance programs. The difficulty that Dodd-Frank introduces to the equation is in the incentives it creates for employees to eschew internal reporting in favor of external whistleblowing. Indeed, one of the most common objections to the SEC's rules has been the fear that they will undermine internal controls that companies have established to ensure compliance with the law.[22] Although the SEC's rules include several provisions designed to encourage the use of internal reporting mechanisms before a whistleblower turns to the SEC, companies should aggressively promote their in-house compliance programs to ensure that employees are well informed of the internal mechanisms available to prevent, report, and resolve potential problems before they ripen into full-blown securities violations.

First, companies should review their existing compliance policies to eliminate weaknesses and clarify any ambiguities. For example, companies should draft policies that identify key personnel responsible for evaluating and addressing compliance issues. This practice not only imposes accountability on the executives and other employees primarily responsible for ensuring compliance; it also identifies the individuals who need to receive information about compliance concerns as soon as it becomes available. In addition, company policies should explain when these compliance officers need to report up the chain of command. Because the SEC rules generally exclude compliance personnel from the class of whistleblowers eligible for whistleblower awards, this is one area in which a company can safely require internal reporting from some of its key employees.[23]

Company policies should also clearly explain internal procedures for avoiding, reporting, and correcting potential problems before they become serious enough to warrant a whistleblower's attention. Moreover, because those procedures can only serve their purpose if employees actually know about them, compliance training is essential – especially for supervisors. Aside from conducting formal training (whether in person or online), one way to verify employee familiarity with company policy is to require an annual certification that each employee has read and understands the company's compliance standards. Employers could also use such a certification process to provide their employees with an opportunity to report misconduct and share concerns.

In addition to providing adequate training, companies should implement their compliance policies in a way that gives employees confidence in their employer's commitment to full compliance with the law. No matter how attractive the SEC's whistleblower awards may look on paper, an employer should assume that at least some employees may prefer remedies that are minimally disruptive and closer to home. To take advantage of that natural preference, companies need to build robust and responsive internal compliance programs. Because taking employee concerns seriously can help create an environment where internal reporting is the norm, addressing internal complaints quickly is critical to the success of a corporate "culture of compliance." And informing employees of the company's response to their complaints as it develops can prevent the frustration that sometimes turns diligent employees into whistleblowers.

Regardless of a company's specific approach to internal reporting, the key ingredient in a successful compliance program is trust, which facilitates the internal flow of information. For that reason, employers should make internal reporting as easy as possible. The more options an employee has for reporting misconduct, the better. Companies should therefore provide dedicated resources for employees to share their concerns about misconduct and compliance issues. Although employees often have better relationships with their colleagues and supervisors than with company management, employers should establish a direct link between employees throughout the organization and the officers responsible for monitoring company compliance. Similarly, telephone hotlines and online forms that allow anonymous reporting can prevent strained personal relationships or the fear of retaliation from keeping would-be tipsters silent.

Another way to encourage internal reporting is to reward the employees who do it. Publicly recognizing employees who demonstrate a commitment to the company's compliance goals can encourage other employees to take similar steps. For employees who would rather not speak out publicly, more discreet incentives for internal reporting, like additional vacation time or financial bonuses, can serve a similar function.

Finally, employers should make a habit of debriefing employees who leave the company to confirm that they have disclosed any knowledge of misconduct or potential compliance issues. Although some employees who have kept silent may be reluctant to speak up at the end of their employment, others are likely to welcome a final opportunity to share their concerns. Exit interviews thus should be as cordial as possible to create an environment conducive to last-minute disclosures.

Avoiding Retaliation Liability

Even the best compliance programs have gaps. When a violation occurs, or an employee fails to abide by the company's commitment to internal reporting and self-policing, the next challenge is to avoid liability for retaliation under Dodd-Frank's whistleblower-protection provisions.

The basic rules are simple enough. As noted earlier in this article, Dodd-Frank dramatically expanded the scope of anti-retaliation protection for employees who report information about potential securities violations, and under the SEC's new rules, those protections apply regardless of whether an employee qualifies for an award under the SEC's rules.[24] These retaliation rules, to some extent, leave employers between a rock and a hard place. To avoid securities violations, companies have to encourage their employees to participate in internal compliance programs. Yet as a practical matter, the new rules prevent companies from disciplining employees who refuse to report suspected misconduct internally before turning to the SEC.

One response to this tension is to adopt policies expressly encouraging internal reporting – with the understanding that these policies cannot be enforced against SEC whistleblowers. A variation on this theme is to incorporate internal reporting into standard employee evaluations by giving credit to employees who participate in the company's compliance programs. These strategies may be appropriate in some circumstances, but companies that pursue them should exercise caution. Policies that appear designed to punish employees who share information with the SEC could easily inspire retaliation claims, even when disciplinary action or termination is warranted for independent reasons.

Regardless of the strategy adopted by a company, all companies subject to the SEC's whistleblower rules need a strong and unequivocal anti-retaliation policy. These policies not only protect employers from exposure to liability under Dodd-Frank's anti-retaliation provisions, they also support the employee trust necessary to internal reporting.

First and foremost, a company's anti-retaliation policy should explicitly prohibit any attempt to discipline, threaten, or otherwise discriminate against employees for engaging in whistleblowing activities. Since the Dodd-Frank anti-retaliation provisions and the SEC's whistleblower rules have not yet been tested by actual anti-retaliation claims against an employer, or SEC actions against an employer, it is not entirely clear who and what will be protected, so prudence dictates a cautious and comprehensive approach in formulating an anti-retaliation policy. For example, at least one court already has held that employees can qualify for whistleblower protection by cooperating in an internal investigation conducted by the employer's outside counsel.[25] Accordingly, instead of risking liability for disciplining "exempt" employees for conduct "unrelated" to the SEC's enforcement efforts, companies should err on the side of caution.

As in the context of compliance policies generally, training employees about their rights and duties under an anti-retaliation policy is crucial. Supervisors, in particular, need to understand that retaliation will not be tolerated. In drafting an employee code of conduct or meting out discipline, companies should focus on deterring retaliating supervisors, not punishing whistleblowers.

Despite the new penalties for retaliation, however, neither Dodd-Frank nor the SEC's anti-retaliation rules preclude legitimate responses to employee misconduct. A judge addressing similar issues under the Sarbanes-Oxley Act explained this concept well: anti-retaliation rules are "not a license to steal documents and break contracts."[26] In other words, employees who violate the law or a company's internal compliance policies are still subject to discipline. The SEC, for its part, has reserved the right to take enforcement action against whistleblowers who violate the securities laws,[27] and companies should adopt a similar attitude toward whistleblowers who flout company policy in pursuit of a whistleblower award.

Companies should also review their record keeping policies in anticipation of potential retaliation claims and strengthen those policies if necessary – taking into account the extremely long limitations period for retaliation claims – making sure that systems are in place to carefully document any adverse employment actions. Avoiding retaliation liability depends on proof that the company would have taken the same action regardless of an employee's whistleblowing activity. The best way to defeat meritless claims is to provide conclusive evidence of legitimate reasons for the company's action against the plaintiff. Employee evaluations, the complaints of co-workers, and carefully documented explanations for any disciplinary decision are thus critical to a successful defense.

Conclusion

As 2011 draws to a close, companies subject to the federal securities laws should take the time to engage in a thoughtful analysis of their whistleblower policies and procedures and, where appropriate, amend or alter those procedures to specifically refer to certain requirements of the SEC rules and certain prohibitions contained in Dodd-Frank, especially the anti-retaliation provisions. The thousands of companies subject to the new whistleblower laws and rules can minimize their exposure to whistleblower liability by developing robust compliance and internal reporting systems and undertaking training specifically designed to address the concerns raised by whistleblowing. Tipping the SEC may become the next "new" thing, but it need not become a special challenge for companies committed to complying with the federal securities laws.

ENDNOTES

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1 "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," SEC Release No. 34-64545 (May 25, 2011) ("SEC Rules Release"). See http://www.sec.gov/rules/final/2011/34-64545.pdf.

2 15 U.S.C. § 78u-6(b)(1) (July 21, 2010).

3 *Id.*; *see also* SEC Rules Release at 245.

4 SEC Rules Release at 247.

5 *Id.* at 248.

6 *Id.* at 248-49.

7 *Id.* at 250.

8 On July 11, 2011, a Bill was introduced in the U.S. House of Representatives that would modify certain provisions of the Securities Exchange Act of 1934 and the Commodity Exchange Act relating to whistleblowing. *See* H.R. 2483, the "Whistleblower Improvement Act of 2011." Among other things, the Bill would require employees in most cases to report their suspicions to their employers before reporting to the SEC in order to be eligible for a whistleblower award.

9 *Id.* at 253-54.

10 15 U.S.C. § 78u-6(b)(1).

11 SEC Rules Release at 254.

12 Rule 21F-2(b)(1).

13 SEC Rules Release at 16.

14 Rule 21F-2(a)(1).

15 Although, as discussed above, SEC has outlined certain situations which will make excluded individuals eligible for a reward.

16 Almost all broker-dealers registered with the SEC are FINRA members and thus subject to FINRA rules.

17 NASD Rule 3070 and New York Stock Exchange Rule 351 were the predecessor rules to FINRA Rule 4530.

18 Note that Rule 4530 can, depending on the circumstances, require self-reporting when the violative conduct impacts the reporting broker-dealer's own customers or itself, *and* when the conduct impacts another broker-dealer or its customers.

19 *See* Supplementary Material .01 to FINRA Rule 4530. See also FINRA Regulatory Notice 11-32 (July 2011), available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p123929.pdf (hereafter "Regulatory Notice 11-32").

20 Rule 4530 obligates FINRA members to self-report to FINRA "promptly" but in no event later than 30 calendar days after concluding that a reportable event has occurred or 30 calendar days from when the firm reasonably should have concluded that the violation had occurred. FINRA interprets the "reasonably should have concluded" language to require the application of a "reasonable person" standard: if a reasonable person, considering the available facts, would have concluded that a violation occurred, then the matter would be reportable. If a reasonable person considering the available facts would not have concluded that a violation occurred or would have been unable to conclude whether a violation occurred, then the matter would not be reportable. *See* Regulatory Notice 11-32.

21 *See* § 240.21F-3

22 *See, e.g.*, Letter from U.S. Chamber of Commerce *et al.* to Elizabeth Murphy, Sec'y, SEC (Dec. 17, 2010), http://www.sec.gov/comments/s7-33-10/s73310-189.pdf.

23 Note, however, that even employees who are ineligible for whistleblower awards qualify for anti-retaliation protection if they share information with the SEC. *See* 17 C.F.R. § 240.21F-2(b).

24 17 C.F.R. § 240.21F-2(b).

25 *Egan v. TraningScreen, Inc.*, No. 10-CIV-8202, 2011 U.S. Dist. LEXIS 47713, at *19-26 (S.D.N.Y. May 4, 2011).

26 *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697, 703 (E.D. Va. 2007).

27 17 C.F.R. § 240.21F-15.