

Public Company Advisor

Practical Insights for Public Company Counsel

February 2012

King & Spalding's Public Company Practice Group periodically publishes the Public Company Advisor to provide practical insights into current corporate governance, securities compliance and other topics of interest to public company counsel.

Whistleblower Bounty Program: Corporate Compliance Program Considerations

Overview

Whistleblower rules adopted under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") have established an award program that incentivizes whistleblowers to report possible violations of all federal securities laws, rules, and regulations to the U.S. Securities and Exchange Commission ("SEC"). The SEC recently reported to Congress that during the first seven weeks of the program's operation, it received 334 whistleblower tips, which most commonly focused on market manipulation, corporate disclosures and financial statements, and offering fraud. While the Dodd-Frank whistleblower rules do not specifically require companies to implement new compliance measures, the SEC's report to Congress serves as a reminder that companies may wish to revisit their compliance programs in light of the considerations discussed below.

Summary of Whistleblower Bounty Program

Dodd-Frank required the SEC to establish a whistleblower award program and provide monetary awards to persons who voluntarily report original information to the SEC regarding possible violations of any federal securities laws if that information leads to a successful action resulting in at least \$1 million in sanctions. The SEC's final rules for this "bounty" program took effect on August 12, 2011.

If the whistleblower satisfies certain eligibility requirements, the SEC will award the whistleblower between 10% and 30% of the monetary sanctions that result from the reported original information. The rules allow for direct reporting to the SEC with no requirement that the whistleblower report the violation using internal compliance procedures or notify the allegedly offending company. The whistleblower must report the information directly to the SEC to qualify for a whistleblower award, even when the whistleblower also reports internally.

Summary of Anti-Retaliatory Protections for Whistleblowers

Dodd-Frank also created whistleblower protections to combat employer retaliation stemming from an employee's disclosure of information to the SEC. Employers may not discharge, demote, suspend, or discriminate in any manner against a whistleblower who lawfully reported information. These protections provide for an independent cause of action that may be brought

by a whistleblower in federal district court or enforced directly by the SEC against any employer that engaged in retaliatory practices. Remedies available in a successful retaliation claim include reinstatement of employment, double back wages plus interest, and the costs of litigation, including attorneys' fees.

Practical Advice for Companies

Despite some incentives to encourage internal reporting, the SEC's new whistleblower rules could undermine a company's internal compliance and reporting procedures by encouraging whistleblowers to report information to the SEC, without also reporting it to the company. To safeguard against the negative effects of these new whistleblower policies and to increase the use of internal compliance procedures, a company should consider whether:

- employees are incentivized to report internally before reporting to the SEC;
- its compliance training focuses on collaborative, joint reporting to the SEC and the benefits of internal reporting;
- it is able to rapidly process and investigate whistleblower allegations;
- it is able to make good decisions with respect to self-reporting;
- its internal reporting procedures are simple and straightforward;
- counsel will be involved early in the investigation of whistleblower allegations; and
- it has an appropriate anti-retaliation policy in effect.

For a more extensive discussion of the whistleblower rules and these recommendations, please see our related article, entitled "SEC Receives 334 Complaints in First Seven Weeks of Dodd-Frank Whistleblower Program, Underscoring Need for Review of Corporate Compliance Policies", which can be accessed on our website at:

<http://www.kslaw.com/imageserver/KSPublic/library/publication/2012articles/1-12BloombergCorpMASteinHarmonGreig.pdf>

About King & Spalding's Public Company Practice Group

King & Spalding's Public Company Practice Group is a leader in advising public companies and their boards of directors in all aspects of corporate governance, securities offerings, mergers and acquisitions and regulatory compliance and disclosure.

About King & Spalding

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

The Public Company Advisor provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. For more information on this issue of the Public Company Advisor, please contact:

Jeffrey M. Stein
+1 404 572 4729
jstein@kslaw.com

Zachary J. Harmon
+1 202 626 5594
zharmon@kslaw.com