

# US Regulatory Update: SEC Issues First Annual Whistleblower Report

On November 15, 2011, the US Securities and Exchange Commission ("SEC") Office of the Whistleblower ("Office") issued the Annual Report on the Dodd-Frank Whistleblower Program for Fiscal Year 2011 ("Report").<sup>1</sup> The Report provides important insights into the controversial whistleblower program. As discussed in more detail below, the SEC received 334 tips in the program's first 7 weeks. Those tips have been dispersed across a broad range of violations and have emanated from across the United States and the globe. In short, the bounties offered by the program have attracted significant attention at the outset of the program.

## Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Title IX, Section 922) amended the Securities Exchange Act of 1934 to establish the whistleblower program by adding Section 21F, Securities Whistleblower Incentives and Protection. Section 21F authorizes the SEC to pay awards to whistleblowers who voluntarily provide original information about violations of the federal securities laws to the SEC leading to a successful enforcement action resulting in monetary sanctions in excess of \$1 million. The awards can range from 10% to 30% of the sanctions recovered.

Section 21F requires the SEC to report to Congress annually on the whistleblower award program.<sup>2</sup> These annual reports must include a description of the whistleblower awards granted, the types of cases involved,

and an accounting and audit of the fund used to pay whistleblower awards. The SEC's first report addresses the Office's activities since establishment and provides initial statistics on the whistleblower tips that the Office received for the 2011 fiscal year (which ended in September). The SEC's final rules defining the whistleblower program became effective on August 12, 2011, and thus the Report covers seven weeks of tips before the end of the 2011 fiscal year.

## Whistleblower Reporting Statistics

The Report states that the Office received 334 whistleblower tips from August 12, 2011 through September 30, 2011. The most common complaints, as categorized by the submitters, were market manipulation (54 tips, or 16.2%),

corporate disclosures and financial statements (51 tips, or 15.3%), and offering fraud (52 tips, or 15.6%). In addition, 13 whistleblower tips (3.9%) related to the Foreign Corrupt Practices Act.

The Office received whistleblower submissions from individuals in 37 states. The largest sources of these claims were California (34 tips), New York (24 tips), and Florida (19 tips). In addition, almost 13% of the tips from identifiable locations originated in foreign countries, with China (10 tips) and the United Kingdom (9 tips) leading the way.

The Report notes that it is "too early to identify any specific trends or conclusions from the data collected to date" due to the recent launch of the whistleblower program and the small sample size of the complaint sample.

The SEC did not pay any whistleblower awards during fiscal year 2011. On August 12, 2011, the Office posted Notices of Covered Actions for the 170 enforcement judgments and orders that included the imposition of sanctions exceeding the statutory threshold of \$1 million for which whistleblowers could claim awards from last fiscal year.<sup>3</sup> The SEC has not yet processed any of the award applications received to date related to these Covered Actions. However, the Report notes that as of September 30, 2011, the Securities and Exchange Commission Investor Protection Fund, which provides funding for the SEC's whistleblower award program, was fully funded with a fiscal year-end balance of \$452,788,043.

## Review of Whistleblower Tips

The Report provides general information about how the SEC processes whistleblower tips. The SEC's Office of Market Intelligence reviews incoming tips, complaints, and referrals "to assign specific, timely and credible" ones to appropriate members of the enforcement staff. The Report does not describe further the standards used or any additional steps the SEC takes to determine whether a tip is "specific, timely and credible" prior to assignment.

## Conclusion

The Report, which many companies hoped would offer insight into "bounty hunting" trends that may impact their businesses, provides a preliminary glimpse into the types of issues that are the focus of whistleblower complaints. Whether these complaints translate into successful enforcement actions, however, remains to be seen. Given Section 21F's lack of an internal reporting requirement prior to reporting tips to the SEC, companies should ensure that they have robust compliance systems in place to identify and effectively remediate compliance risks and should encourage a culture of internal reporting to prevent becoming the targets of whistleblower allegations.

- <sup>1</sup> The Report is available at <http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf>.
- <sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act (July 2010), available at [http://www.cliffordchance.com/content/dam/cliffordchance/PDF/Dodd-Frank\\_Memo\\_Revised\\_August.pdf](http://www.cliffordchance.com/content/dam/cliffordchance/PDF/Dodd-Frank_Memo_Revised_August.pdf).
- <sup>3</sup> The SEC posts Notices of Covered Actions at <http://www.sec.gov/about/offices/owb/owb-awards.shtml>.

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