



Whistleblowing in the Corporate World Series: Part I

The Advent of the SEC Whistleblower Program

Presenter

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KPMG's 2009 Integrity Survey

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- 74% of employees personally observed/had firsthand knowledge of wrongdoing during previous 12 months
- 47% didn't believe they would be protected from retaliation if they reported misconduct
- 61% didn't believe they would be satisfied with outcome if they reported misconduct
- **In the banking/finance industry, 60% reported that the wrongdoing they observed could cause “a significant loss of public trust if discovered.”**

Common Enforcement Problems Before Dodd-Frank

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- **Lack of actionable information**
 - Limited self-reporting by corporations
 - Low percentage of high-quality tips
 - Potential liability
 - Insufficient protections & incentives
- **Regulators as first responders**
- **Circumstantial case development challenges**

A Changing Landscape

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- Madoff scandal
- Financial crisis
- Congressional investigations/inquiries
- Government enters banking business
- Public outcry

SEC Cooperation Program

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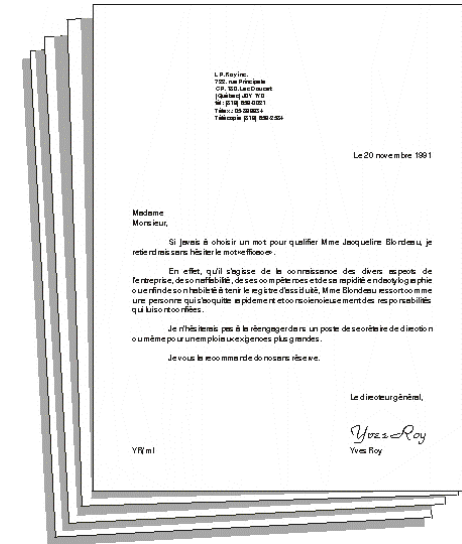
- Established January 2010
- Incentives for individuals & companies with potential civil and criminal liability to cooperate in enforcement matters:
 - Proffer agreements
 - Cooperation agreements
 - DPAs
 - NPAs
 - Immunity requests



SEC Whistleblower Program

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- Dodd-Frank Wall Street Reform and Consumer Protection Act enacted July 2010
- Act required the SEC to establish a whistleblower program which offers:
 - Anonymous reporting
 - Robust employment protections
 - Significant monetary awards
- The implementing rules for the program became effective in August 2011



Key Stakeholder Concerns

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- Internal Reporting
- Culpable Whistleblowers

Who Can Be An SEC Whistleblower?

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- Any individual who, alone or jointly with others, provides information to the SEC relating to a possible violation of the securities laws that has occurred, is ongoing, or is about to occur.
- Only individuals, not companies, are eligible for the whistleblower protections and incentives in Dodd-Frank.

- With few exclusions or qualifications, a whistleblower can be any individual – regardless of citizenship
- Eligible securities violations may occur anywhere in the world
- Violators can be individuals or organizations (public or private)
- Jurisdictional Nexus: investors, investments, operations, employees or clients in the United States
- International information sharing

Anonymous Reporting— Overview

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- Confidential nature of SEC investigations
- Statutory representation requirement
- Practical reality

Employment Protections— Protected Conduct

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- Providing information about possible securities violations to the SEC
- Participating in any SEC investigation or related enforcement action
- Making disclosures to the SEC required by law

Employment Protections— Regulatory Requirements

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- Reasonable belief
- Compliance with SEC rules

Employment Protections— Avenues for Relief

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- Private right of action in federal district court
- No administrative exhaustion requirement
- Unwaivable right to a federal jury trial
- Reinstatement with equivalent seniority
- Two times back pay with interest
- Attorney's fees and related expenses

Employment Protections— Statute of Limitations

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- Six years after the date the retaliation occurred;
or
- Three years after discovering retaliation
- ...but in no event longer than 10 years after the date of violation

Monetary Awards— Overview

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Subject to the eligibility requirements, the Commission will pay an award or awards, 10-30% of the monetary sanctions collected, to one or more whistleblowers who:

- Voluntarily provide the SEC
- With original information
- That leads to the successful enforcement by the Commission in a federal court or administrative action
- In which the SEC obtains monetary sanctions totaling more than \$1 million

The SEC will also pay an award based upon amounts collected in certain related actions.

Whistleblowers Ineligible for an Award

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- Individuals criminally convicted for related misconduct
- Members, officers and employees of the SEC and other enumerated organizations
- Family members and those that reside with an SEC member or employee
- Members, officers and employees of a foreign government
- Individuals that knowingly or willfully provide false information to the SEC

Whistleblowers with Qualified Eligibility for an Award

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- Attorneys
- Accountants
- Officers, directors, trustees, and partners
- Employees or contractors whose duties involve compliance or internal audits
- Individuals retained to conduct an internal investigation involving possible violations
- Individuals who obtain information about violations from an ineligible individual

Key Definitions— Voluntarily Provide

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- No pre-existing legal duty or agreement to provide such information to the SEC
- Information provided to SEC *before* receiving a request, inquiry or demand relating to the same subject matter from the SEC or other select federal, state and self-regulatory organizations

Key Definitions— Original Information

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- Information is “original” if it is...
 - not already known to the SEC;
 - not exclusively derived from allegations in a judicial or administrative proceeding; and
 - provided to the SEC for the first time after July 21, 2010
- Information can be derived from a whistleblower’s...
 - independent knowledge
 - independent analysis

Key Definitions— Leads to Successful Enforcement Action

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- The SEC will consider the information that you provided to have led to a successful enforcement action if:
 - the information was sufficiently specific, credible, and timely to cause the staff to commence an examination, open/re-open an investigation, or inquire into different conduct as part of a current examination or investigation
 - the information significantly contributed to the success of an ongoing examination or investigation

Key Definitions— Monetary Sanctions

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- All monies, including penalties, disgorgement, and any interest, ordered to be paid and money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of Sarbanes-Oxley
- To meet the \$1 million minimum threshold, monetary sanctions from actions that arise out of the same nucleus of operative facts may be grouped together

Common SEC Violations

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- Insider trading
- Misrepresenting/omitting important information about securities
- Manipulating market price
- Stealing customer funds
- Violating broker-dealers' responsibility to treat customers fairly
- Selling unregistered securities
- Improper revenue recognition
- FCPA

Criteria for Determining Amount of Award

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- Factors that may increase an award include:
 - Significance of the information provided
 - Degree of assistance provided
 - Law enforcement interest in making the award
 - Participation in internal compliance systems
- Factors that may decrease an award include:
 - Culpability or involvement in the reported misconduct
 - Unreasonable reporting delay
 - Interference with internal compliance systems

SEC Enforcement Activity In Perspective

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- More than **2000** active cases at any given time
- **700-750** enforcement actions brought each year
- **Approximately 20%** exceed **\$1 million** in monetary sanctions
- **\$2.8 billion** in monetary sanctions were secured by the SEC in 2011—without the benefit of SEC Whistleblowers.
- More than **30,000** tips/year before Dodd-Frank
- Estimates **30%** increase in tips, complaints and referrals
- SEC reports “significant uptick” in quality tips

SEC Sanctions Are Just The Beginning

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- Public censure
- Reputational harm
- Shareholder actions

Recent Survey Findings I

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- Littler Mendelson, Whistleblower Survey, November 2011
 - 96% report concern about whistleblower claims
 - 73% reported this as an emerging risk area
 - 67% predicted that whistleblower claims increasing
 - 65% reported being “only moderately” prepared
- Ethics Resource Center, National Business Ethics Survey, January 2012
 - 42% reported that their employer had a weak ethical culture
 - 45% witnessed misconduct at work
 - 22% of employees who reported misconduct perceived retaliation

Recent Survey Findings II

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- Labaton Sucharow, US/UK Financial Industry Survey, July 2012
 - 39% believed competitors had engaged in illegal or unethical conduct
 - 26% had observed or had first-hand knowledge of misconduct in workplace
 - 94% would report wrongdoing given the protections and incentives of the SEC Whistleblower Program
 - 44% were aware of the SEC Whistleblower Program

5 Tips For Every Responsible Organization

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1. Invest in compliance
2. Have a game plan
3. Self-report
4. Communicate more
5. Establish a culture of integrity

5 Insider Tips For Potential SEC Whistleblowers

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1. Know the odds
2. Attempt to identify violations
3. Legally collect evidence
4. Be prepared
5. Timing matters

Additional Resources

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REQUEST CASE EVALUATION



In this era of corporate scandal, the world needs more truth tellers. History has consistently shown that law enforcement authorities cannot effectively and efficiently police the marketplace without the assistance of private individuals and entities. Labaton Sucharow is dedicated to helping responsible organizations establish a culture of integrity and courageous whistleblowers to report possible securities violations—without regrets.

SEC Insider's Guide

SEC Whistleblower Program Handbook

Securities Law Primer

SEC Whistleblower Eligibility Calculator

SEC Whistleblower Sanctions Database

Could You Blow the Whistle? Labaton Sucharow's SEC Whistleblower Eligibility Calculator

Jordan Thomas - Monday, July 30, 2012

Established under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the [SEC Whistleblower Program](#) is a powerful new tool that financial regulators and law enforcement authorities have to detect, investigate and prosecute corporate wrongdoing. With its significant [employment protections](#), [monetary awards](#) and [anonymous reporting](#), the SEC's innovative program is also an important vehicle for everyday citizens to take a stand and speak out against misconduct.

But do people know about the program? The answer is not enough.

In December 2011, as part of our [Ethics & Action](#) survey, we found that only 32% of Americans were aware of the SEC Whistleblower Program. In our recent survey of the financial services industry, [Wall Street, Fleet Street and Main Street: Corporate Integrity at a Crossroads](#), only 44% of respondents were aware of this critical investor protection initiative.

To increase public awareness of the SEC Whistleblower Program, we have launched an [SEC Whistleblower Eligibility Calculator](#). This first-of-its-kind web-based tool helps potential whistleblowers understand the in's and out's of the program. The easy-to-use calculator presents users with various questions, which then lead to a customized and detailed eligibility report. The assessment also provides numerous links to the rules, regulations and other helpful resources.

In the News

- [Bloomberg Law—The SEC Whistleblower Program's Annual Report](#)
- [Fox Business—Will Whistleblower Rules Help SEC Investigations?](#)
- [Labaton Roundtable—Global Impact of U.S. Financial Reforms](#)

VIEW ALL NEWS

**For the People.
By the People:**
The SEC Whistleblower Program & Establishing a Culture of Integrity

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