

Open Season on Employers?

SEC Adopts Final Rules Implementing Whistleblower Incentive Program

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On May 25, 2011, the U.S. Securities and Exchange Commission (SEC) adopted final rules to implement the whistleblower incentive program established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) that provides large monetary incentives to individuals who report securities violations to the SEC. The proposed rules, published for public comment on November 3, 2010, prompted significant debate and reaction from companies concerned that the incentive program encourages employee “bounty hunting” at public companies and employees to bypass established internal compliance measures, which were painstakingly established by employers in the wake of Sarbanes-Oxley. Under Dodd-Frank, an individual who voluntarily reports “original information” that leads to a successful enforcement action in which the SEC obtains monetary sanctions totaling more than one million dollars, is entitled to a discretionary award of between 10 to 30% of that amount. “Original information” is defined as information based on a whistleblower’s independent knowledge or independent analysis, not already known to the SEC and not derived exclusively from certain public sources.

The final rules define critical terms in the statute and outline the procedures to follow when submitting “original information.” Also detailed are the SEC’s procedures for making decisions on claims and the factors considered in establishing the award amount. Perhaps equally noteworthy is that the SEC decided not to include an internal reporting requirement to the whistleblower incentive program in the final rules, even after considerable public comment on this issue. The final rules do, however, provide some incentives for whistleblowers to report internally, such as making voluntary participation in a company’s internal compliance system a factor that increases the amount of the award. Whether the final rules effectively address employers’ concerns about creating a “bounty system” for employees will be played out over the coming months and years. As a practical matter, public companies should continue to implement and enforce policies and procedures for preventing securities fraud in the first instance and train managers on how to resolve issues promptly and effectively.

Stay tuned for an upcoming Miller Canfield informational seminar for employers on the expansion of rights and remedies of whistleblowers under Dodd-Frank, including its whistleblower incentive program and anti-retaliation provisions, and best steps for employers to avoid potential lawsuits under these provisions.

For more information, contact your Miller Canfield Employment + Labor attorney.