

The SEC's Final Whistleblower Rules & Their Impact on Internal Compliance

BY STEPHEN M. KOHN

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On August 12, the Securities and Exchange Commission's (SEC's) Final Rules implementing the Dodd-Frank Wall Street Reform Act's whistleblower rewards provisions became effective.¹ During the rulemaking process, more than 1,500 individuals, public interest groups, lobbyist and corporations had filed formal, on-the-record comments. The Final Rules have a far-reaching impact on all corporate internal compliance programs in the United States and have, in fact, rewritten the basic framework for which companies regulated by the SEC must manage their internal compliance programs.

Although whistleblowing is always a highly controversial topic, it was the issue of "internal compliance" and the impact of the Dodd-Frank Act's securities fraud reward provisions on existing corporate ethics programs that raised the greatest amount of concern within the regulated community. In the end, the SEC's rules inte-

grated ideas both from the corporate community and from public interest advocates.

The SEC whistleblower rules enhance internal reporting mechanisms and protect the right of employees to disclosure corporate fraud. The details of the rules are complex and easily misunderstood by corporate managers, compliance official and

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From the EDITOR

SEC at a Crossroads: Scandals Continue to Flare as Reform Legislation Emerges

While the Securities and Exchange Commission may find itself at a crossroads—beset by several continuing scandals, reeling from a recent court decision and facing a Congress intent on reworking the agency—the agency may take some cold comfort from that fact that it has been here before.

First, the scandals—on one hand, the SEC is dealing with the very uncomfortable revelations that it was destroying records of its preliminary investigations, and possibly continued to do so long after it was told to stop. Now, Congress and the National Archives, the agency that oversees federal record-retention, are ramping up their scrutiny of the SEC's document policies and how the SEC dealt with these allegations and the SEC employee-turned-whistleblower who brought them forward.

Another dark cloud for the SEC is the possible criminal investigation said to be brewing against David M. Becker, the former SEC general counsel, who helped set the SEC's recommendations for compensating the victims of the Madoff Ponzi scheme even though he apparently had a financial stake in the result.

Both scandals, despite their very different details, have similar themes—cover-up, cronyism and the ever-revolving door between the SEC and large Wall Street law firms—that too often seem to surface whenever the SEC gets some bad press. For example, Becker was hired at the insistence of SEC Chairman Mary Schapiro, and early allegations of Becker's conflict of interest were brushed off. So too in the document-shredding scandal is the whiff of something much more serious as questions now arise as to whether documents were destroyed pertaining to more than just informal preliminary investigations and possibly were done to keep the heat off certain Wall Street firms.

Second, the court ruling—in July, a U.S. district court tossed out the SEC's proxy access rule, which provided shareholders with means to nominate and elect board directors. The court specifically cited the SEC's failure to properly analyze the costs and benefits of the rule. The decision was a huge setback for the SEC, as it had made shareholder proxy access a centerpiece in its investor advocacy battles of the past few years.

These recent events couldn't have come at a worse time for the SEC (as if there is a good time for such things to come up). Several top members of Congress have made no secret of their disdain for the SEC, and haven't been shy about using the recent scandals as a bludgeon. Now, two pieces of pending legislation—the SEC Modernization Act of 2011 and the SEC Regulatory Accountability Act—could well change the mission and trajectory of the SEC.

The SEC Modernization Act proposes to reform the internal organization of the SEC, and alters its divisional make-up and the chain of command while creating several new offices. (For more on the Modernization Act, see the September 2011 issue of *Wall Street Lawyer*, vol. 15, no. 9.) The SEC Regulatory Accountability Act proposes to change how the Commission makes rules for those entities it oversees, emphasizing the need for a cost-benefit analysis of any proposed rules.

All of this came to a head September 15, when the House Financial Services Committee held hearing entitled "*Fixing the Watchdog: Legislative Proposals to Improve and Enhance the Securities and Exchange Commission*," at which Chairman Schapiro testified.

Outlining the difficulties facing the SEC, Schapiro told the Committee: "A critical challenge facing SEC management is determining how best to stage follow-up work in the current resource-constrained environment... our follow-up process has been focused on thinking strategically and prioritizing the various initiatives."

For Schapiro's and the SEC's sake, that thinking and prioritizing better happen pretty fast, before the SEC and its investor protection mandate are irreparably damaged in the political process.

—GREGG WIRTH, MANAGING EDITOR

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whistleblowers. Key to the success of the SEC's whistleblower rewards program is a comprehensive understanding of the intricacies of the Final Rules and an understanding of how they will strengthen voluntary corporate compliance while protecting whistleblowers.²

The Argument over Internal Compliance

More than 25 years ago, the relationship between internal compliance programs and whistleblowing got off on the wrong foot. One of the earliest disputes in whistleblower law was whether or not an employee's communication with internal compliance programs constituted a protected whistleblower disclosure under federal whistleblower protection laws.

In 1984, the U.S. Courts of Appeals for the Fifth and Ninth Circuits split over the issue of protected internal disclosures. The Ninth Circuit held that these disclosures are protected,³ while the Fifth Circuit held that they are not. The Fifth Circuit, in the case of *Brown & Root v. Donovan*, held that employees who raised nuclear safety issues internally could be fired and were not protected under federal law.⁴ This split in legal authority continues and has resulted in numerous whistleblowers having their cases thrown out of court simply because they blew the whistle to their supervisors or their compliance programs instead of to the government.

In the 25 years that followed the *Brown and Root* decision, corporations that addressed this issue in court uniformly argued that employees who raised concerns to their managers or their internal compliance programs were not protected under federal whistleblower laws and could be fired. They often won these cases.⁵

These legal positions pointed out a flaw in the arguments raised by the Chamber of Commerce and its allies during the Dodd-Frank rulemaking proceeding. How could corporations argue to the SEC that employees should be compelled to report allegations to internal compliance programs while arguing at the same time in courts throughout the United States that these same employees

could be fired if they reported allegations to their compliance programs?

The first whistleblower case decided under the Dodd-Frank Act illuminated the contradictory nature of the Chamber's argument. In *Egan v. TradingScreen, Inc.*,⁶ the employee had reported serious allegations of fraud to his company's Board of Directors and thereafter had worked with outside legal counsel (Latham and Watkins) appointed by TradingScreen's Board of Directors to investigate the frauds. The investigation proved that the whistleblower was correct. Latham and Watkins made its report. The wrongdoer (who was the CEO) remained in his job and escaped punishment. The whistleblower was fired.

When the U.S. District Court for the Southern District of New York heard the case, the respected corporate law firm of Morgan Lewis represented TradingScreen. Morgan Lewis argued that internal whistleblowing, even under Dodd-Frank, was not protected. They urged the court to uphold the termination on these technical legal grounds. Morgan Lewis prevailed, and the worker's discharge was upheld. Internal reports were not protected. The court held that since the whistleblower had not reported his concerns to the SEC he could be fired.

Incredibly, the same law firm that won the *Egan* case and set precedent under Dodd-Frank that internal reporting is *not* protected then filed a rulemaking petition with the SEC supporting the position of the Chamber of Commerce. Morgan Lewis argued to the SEC that internal whistleblowing was extremely important and should be required under the Final Rules.

In their December 17, 2010, letter to the SEC, Morgan Lewis wrote that:

The Commission should mandate that individuals report their information through their companies' internal reporting channels... in order for individuals to qualify as whistleblowers. Once an individual has reported the alleged misconduct internally, the employee should be required to wait 180 days to permit the company to investi-

gate the alleged misconduct properly, and address it.⁷

Thus, under the Morgan Lewis theory of whistleblowing, all whistleblowers would be required to report their concerns internally. At that point, they could be legally *fired*. Only after whistleblowers have exhaust the 180-day time period—during which they are susceptible to retaliation—can they contact the SEC and make a protected disclosure.

Although only Morgan Lewis was brash enough to argue *both* positions during the actual rulemaking proceeding, the Chamber of Commerce and other corporate lobbyists implicitly made the same argument when they demanded that the SEC force employees to report their concerns internally. At the same time, however, they failed to repudiate the years of case-law precedent advocated by these same corporate interests, which held that companies could *fire* employees who reported allegations of fraud internally.

The National Whistleblowers Center (NWC), which has strongly supported the right of employees to report concerns internally to compliance departments since its formation in 1988, jumped on this inherent flaw in the Chamber's argument. From the NWC's very first meeting with SEC staff in August 2010 to its final communications with the SEC approximately one week before the Final Rule was voted on, the NWC provided the Commission with scores of legal precedent in which courts throughout the U.S. approved the arguments raised by members of the Chamber of Commerce that internal whistleblowers could be *fired*. When the *Egan* case was decided, the NWC issued a special letter to the SEC explaining its dangerous precedent.⁸

The NWC pointed out to the Commission how legal arguments by the Chamber of Commerce members in fact undermined corporate compliance programs. The NWC understood from its years of experience in this area that many whistleblowers voluntarily contact compliance departments, and that communications with compliance needs to be protected, in the same way as contacts with government agencies needed to be protected. Instead of trying to divide compliance

and whistleblowing, the NWC urged the SEC to adopt rules that harmonized the two concepts: treat internal and external whistleblowing equally under the Dodd-Frank Act.

In its December 17, 2010, rulemaking petition the NWC stated:

[T]he [SEC] should establish a rule that contacts with internal compliance departments and employee supervisors have the same protection as contacts with the SEC. Given the corporate track record on these issues, this mandate must be established by formal rule... Should an internal complaint result in a finding of a violation and lead to the [SEC] issuing a fine, penalty, or disgorgement, the employee whose application was submitted thorough the internal complaint process shall be fully eligible for a reward. With these rules in place, corporations would be free to develop and utilize their internal compliance programs to encourage employees to report problems within the company without undermining an employee's unequivocal statutory right to file a claim directly with the [SEC].⁹

The NWC's formal rulemaking "Conclusion #7" stated as follows:

By formal rule, the SEC must establish that disclosures submitted to internal compliance programs be afforded the same level of protection as direct disclosures to the SEC. In this regard, the SEC should establish, by rule, that it will consider a claim or disclosures filed internally within a company to constitute a formal request for a reward under SEC § 12F. The SEC should establish rules to adjudicate these claims...

Thereafter, in a January 25, 2011, meeting between NWC and SEC Staff, the NWC provided specific language as to how to harmonize the rights of employees to report allegations of fraud both internally and externally. The NWC proposed language that would permit whistleblowers to raise their concerns internally. The language would then require the company to conduct an investigation and self-report violations to the

SEC and the whistleblower would thereafter be entitled to a reward based on his or her internal disclosures.¹⁰

The Final Rules

The Right of Employees to Contact the SEC or Report Concerns to Corporate Compliance Programs

The SEC Final Rules permit employees to report violations directly to the SEC without first reporting the violations to a supervisor or the company's compliance department.¹¹ Even if an employee is not qualified for a reward, the SEC rules prohibit retaliation against employees who provide information to the SEC and make harassment or retaliation against these employees a regulatory offense.¹²

Consistent with the proposal filed by the NWC, the SEC wanted to create a "clear alternative path," giving employees a choice between filing their complaints with the SEC directly or with their company's internal compliance program. To make this choice real, the SEC authorized the payment of rewards to employees regardless of whether the employee made his or her initial disclosure to a compliance department or the SEC. The SEC also created "incentives for employees to utilize their company's internal compliance systems."¹³

These incentives are as follows:

1. If a whistleblower reports a violation internally to the company's compliance program, the company investigates the allegation, and the company self-reports the violation to the SEC, the whistleblower can qualify for a reward based on the self-reported violations, even if the initial allegation resulted in the company discovering larger violations;
2. If the whistleblower reports his or her allegations to the SEC within 120 days of the internal report, the whistleblower is entitled to a full reward based on his/her disclosures to internal compliance;
3. The SEC will take internal reports into consideration when evaluating how large of a reward a whistleblower should be granted. It will potentially provide larger rewards to whistleblowers who attempted to utilize internal compliance programs first;
4. Although not discussed in the SEC rules, if a company attempts to cover-up the whistleblower's allegations, the ultimate sanctions issued by the SEC could be much larger.¹⁴ Thus, if the SEC reviews the matter and determines that the company's internal compliance process was deficient in its response to a whistleblower allegation, there is a high probability that the SEC will issue far more serious fines and sanctions against the offending company.

In its official "Fact Sheet" on the SEC whistleblower program, the SEC's Office of the Whistleblower explained its policies concerning rewarding employees who choose to initially raise their concerns within the company:

Although internal reporting is not required to be considered for an award, you may be eligible for an award for information you reported internally if you also report the information to [the SEC] within 120 days of reporting it internally. Under these circumstances, [the SEC] will consider your place in line for determining whether your information is 'original information' to be the date you reported it internally. In addition, if the company to which you reported conducts an investigation and reports the results to [the SEC], you will benefit from all the information the Company's investigation turns up when [the SEC] is considering whether you should receive an award and if so where the award should fall in the 10% to 30% range.¹⁵

Under this rule, employees who report internally will still qualify for rewards if they also report their concerns to the SEC within 120 days. This 120-day rule creates an incentive for companies to conduct competent, independent and timely internal investigations. If, at the end of the 120-day

time period, the company determines that there was a violation and self-reports to the SEC, the initial internal whistleblower can still qualify for a reward and benefit from the company's internal investigation and self-report.

Under the new rule, if the compliance investigation is competent and independent and determines that there is no material violation, the case should be closed. However, if the company botches or stalls the investigation, or engages in a cover-up, the employee will have every incentive to file with the SEC. The employee can raise complaints not only regarding the initial allegations, but also on the failure of the company's internal compliance program.

Thus, by creating a safe-harbor for employees to utilize internal compliance programs, the SEC addressed the major fear raised by corporations that the majority of employees would go straight to the government for a large cash reward. Indeed, the SEC created incentives for employees to utilize existing corporate compliance programs in the following ways:

- First, they ensured that whistleblowers could still fully qualify for rewards if they filed internal reports; and
- Second, they created a rule that could increase the amount of a reward paid if an employee first attempted to resolve his or her concerns within the company.

In this way, the SEC minimized the incentive for employee to bypass internal compliance.

However, if a company's compliance program had a bad reputation or the company had a history of retaliation, whistleblowers were still lawfully permitted to bypass internal channels and file claims directly with the SEC. Moreover, these claims could be filed anonymously in order to protect the employee from retaliation. The decision whether or not to file internally or externally was left to the sound discretion of the employee.

In this manner, the SEC used its rulemaking authority to create incentives on companies to have aggressive and well-managed compliance programs that employees would feel comfortable using. This was the SEC's explicit intent. In

the Commentary on the Final Rule, the SEC explained its rationale behind this rule as follows:

[O]ur approach should encourage companies to continue to strengthen their internal compliance programs in an effort to promote internal reporting. Potential whistleblowers are more likely to [report]... internally when they believe that the company or entity has a good internal compliance program—i.e. a compliance program that will take their information seriously and not retaliate. We anticipate that companies will recognize this, take steps to promote a corporate environment where employees understand that internal reporting can have a constructive result.¹⁶

The Right of Compliance Officials to Blow the Whistle

The SEC Final Rules also address the rights of employees engaged in compliance functions to blow the whistle. Again, the SEC reached a middle ground between the conflicting positions.

The Final Rules have an initial disqualification for employees who perform compliance or audit-related functions. But this disqualification has four major exceptions. Based on these exceptions, most compliance-related employees should still be able to qualify for a reward if their company fails to implement an independent, trusted, and well-managed compliance program.¹⁷

The initial scope of the disqualification, before the exceptions, is very broad. Employees, directors and outside consultants who "learn" of violations "in connection with" a company's internal compliance program are disqualified from obtaining whistleblower rewards. This includes all employees who "obtained the information" about potential violations because the employee was:

- "An officer, director, trustee, or partner" in the company, and "learned the information in connection with the entity's process for identifying, reporting, and addressing possible violations of law";

- “An employee whose principal duties involve compliance or internal audit responsibilities”;
- A person “associated with a firm retained to conduct an inquiry or investigation into possible violations of law” or an employee of a “firm retained to conduct compliance functions”; and
- An employee of a “public accounting firm” and the employee “obtained the information through the performance of an engagement required of an independent accountant under the Federal securities law.”¹⁸

However, this disqualification terminates, and these compliance-related employees become eligible to file whistleblower claims and obtain rewards, if any one of four exceptions is met. These exceptions are broad and place a premium on companies properly funding their compliance programs and ensuring that these programs do not cover up any misconduct.

The four exceptions are:

1. If the “disqualified” employee has a “reasonable basis” to believe that providing the information immediately to the SEC is “necessary to prevent” the company “from engaging in conduct that is likely to cause substantial injury to the financial interest” of the corporation or investors;
2. If the disqualified employee has a “reasonable basis” to believe that the company is engaging in conduct “that will impede an investigation of the misconduct”;
3. “At least 120 days has elapsed since the employee provided the information to the relevant entity’s audit committee, chief legal officer, chief compliance officer (or their equivalents) or his or her supervisor”; *or*
4. At least 120 days has elapsed since the employee has “personal awareness that [the] company’s audit committee, chief legal officer, chief compliance officer (or their equivalents) or [his or her] supervisor were made aware of the information.”¹⁹

These four exceptions are well-designed to ensure that companies conduct expeditious and aggressive investigations regarding credible allegations of misconduct. They also ensure that companies do not cover up investigation findings.

The first exception governs a situation when a compliance-related official learns of a major fraud that could cause immediate harm to investors or the company. It only makes sense to encourage that official to immediately contact the SEC. This is the type of case that the SEC should be promptly informed of, especially because innocent investors could suffer significant losses. The SEC rule is common sense; companies should encourage this form of reporting.

The second exception relates to any form of misconduct that impacts a company’s compliance efforts. There are numerous cases in which auditors and compliance officials have complained about retaliation for doing their job of investigating fraud. There are other cases in which compliance professionals have faced significant pressure when trying to do their jobs. This rule creates a much-needed disincentive directed at any managers who seek to thwart an aggressive compliance-related investigation. If a Chief Compliance Officer or an auditor faces pressure to engage in a cover-up, those officials can immediately report their concerns to the SEC and qualify for rewards. Under this rule, corporate managers who retaliate against employees who perform compliance functions risk triggering the right of their employees to report such misconduct to the SEC. These compliance officials would also have to report the improper company attempts to harass its compliance staff and/or cover-up misconduct in order to qualify for the reward.

The final two exceptions are the most important. They create a tremendous incentive on companies to properly fund their compliance departments and to provide them with the tools they need to conduct a timely and independent investigation. Under these exceptions, a report of misconduct to an appropriate official within a company triggers a 120-day clock. At the end of the 120-day time period, *any* employee who has obtained significant information about the potential violation due to their investigatory functions

is free to blow the whistle to the SEC and qualify for large rewards. By the end of the 120-day time period, a significant number of corporate employees could know the substance of the initial allegation.

As can be seen from these exceptions, if a company does not have a well-developed internal compliance program, it will not be able to meet its obligations under the 120-day rule. Thereafter, *all* employees who perform compliance-related functions, from the Chairman of the Audit Committee all the way down to a low-level accountant or line-auditor, are free to blow the whistle to the SEC and collect a reward, even if they learned of the alleged violations as part of their official duties.

The pressure that the 120-day rule places on corporate compliance programs was intentionally strict. The SEC wanted to use this rule as an incentive to have companies properly fund their compliance programs and ensure that they promote a culture that is not hostile to whistleblowers. In the commentary on the Final Rules, the SEC explained this intent:

[I]ssuers who previously may have under-invested in internal compliance programs may respond to our rules by making improvements in corporate governance generally, and strengthening their internal compliance programs in particular.²⁰

The Immediate Impact on Employees Who Perform Compliance Functions

During the debate leading up to the approval of the SEC's Final Rules, representatives from the corporate community strenuously argued that properly functioning internal corporate compliance programs would play a central role in fraud prevention and detection. The SEC took the business community at its word and created rules that clearly encourage corporations to implement well-managed, independent and effective corporate compliance programs. These rules have placed more responsibility on the Chief Compliance and Ethics Officers (CCFO), who must

now oversee a whistleblower-friendly post-Dodd-Frank environment.

First, whistleblowers have a strong incentive to initially use a corporation's internal compliance program. But if the compliance program fails, that whistleblower has every right to report his or her allegations to the SEC and also to provide information to the SEC concerning the failure of the compliance investigation.

Second, if the corporate compliance program engages in any form of misconduct in responding to the whistleblower allegations, or if other managers within the company try to pressure the compliance program to cover-up wrongdoing, *every employee* within that company's compliance program is free to report this misconduct to the SEC, to report information concerning the underlying violations to the SEC, and to qualify for a full reward. Thus, a CCEO must not only ensure that his or her program operates independently and honestly, but must also ensure that his or her program is free from improper influence from operational programs and those accused of misconduct. Again, misconduct occurring during the investigation of a whistleblower's concerns unlocks the right for *every employee* within the company's compliance program to contact the SEC and qualify for a monetary whistleblower reward.

Third, if a compliance department's mismanagement or lack of resources prevents it from completing investigations within the 120-day grace period, *every employee* working in the compliance area becomes eligible to file a reward application with the SEC and—if he or she meets the criteria—obtain a monetary reward. The failure of the compliance program to meet complete investigations in a timely manner will again place the CCEO under the microscope, raising serious questions about its competence in performing investigations.

Conversely, these rules provide strong incentives for a company's CEO and Board of Directors to properly fund and ensure the independence of their compliance program. This was the intent of the SEC. The Commission wanted to see top corporate managers approve "improvements in corporate governance," and the "strengthen-

ing” of internal compliance. They intended that the rules would induce Boards of Directors and CEOs to “take steps to promote” a corporate culture in which employees would feel free to contact a company’s internal compliance department without fear of retaliation and with confidence that the program was independent and properly managed.²¹

Conclusion

During the rulemaking debate over the SEC’s whistleblower program, the critical role employees play in identifying fraud was fully documented.²² The goal of the SEC’s whistleblower program is to encourage employees to do the “right thing” and report serious frauds (the program only covers major frauds that will result in sanctions exceeding \$1 million dollars.) The SEC ultimately concluded that implementing a program that could encourage employees to report fraud was critical to the health of markets. Far from imposing a “burden on competition,” the SEC understood that its whistleblower program had the potential to boost the markets and have a strong “pro-competitive effect.” As explained by the SEC:

[B]y increasing the likelihood that misconduct will be detected, the rules should reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.²³

NOTES

1. Implementation of the Whistleblower Provisions of § 21F of the Securities Exchange Act of 1934; 17 C.F.R. Parts 240 and 249. The final SEC whistleblower rules, the formal public comments of the five Commissioners regarding these rules and all of the NWC’s nine formal rulemaking comments are posted on the Web site of the National Whistleblower Center, located at www.whistleblowers.org.
2. Securities Whistleblower Incentives and Protections; 76 Fed. Reg. 34300, 34323-27.
3. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984).

4. *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1 I.E.R. Cas. (BNA) 413, 118 L.R.R.M. (BNA) 2301, 108 Lab. Cas. (CCH) P 10372 (5th Cir. 1984).
5. NWC, *Impact of Qui Tam Laws on Internal Compliance, A Report and Supplemental Rulemaking to the Staff of the SEC*, p.90 (January 25, 2011); <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/1.25.2011lettertoschapirochevron.pdf>.
6. *Egan v. TradingScreen, Inc.*, 32 I.E.R. Cas. (BNA) 418, Fed. Sec. L. Rep. (CCH) P 96307, 2011 WL 1672066 (S.D. N.Y. 2011).
7. Morgan Lewis to SEC (12/17/10), <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/12.17.2010morganlewis.pdf>.
8. Kohn to SEC (May 16, 2011), <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/5.16.2011lettertoschapiroandgensler.pdf>.
9. NWC, *Impact of Qui Tam Laws on Internal Compliance*, pp. 12-13 (December 17, 2010). In its cover-letter to the report, the NWC made the same point: “NWC strongly urges that the [SEC] rules be revised and implemented... [to] treat employees equally whether they choose to make their disclosures internally, externally, or both.” Kohn, *et al.*, to SEC, p. 4 (December 17, 2011); <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/12.17.2010secformalcomment.pdf>.
10. NWC, *Impact of Qui Tam Laws on Internal Compliance, A Report and Supplemental Rulemaking to the Staff of the SEC*, p.4 (January 25, 2011); <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/1.25.2011lettertoschapirochevron.pdf>.
11. SEC Commentary on Final Rule, 76 Fed. Reg. 34300, 34301 (no requirement that whistleblowers report violations internally) (June 13, 2011).
12. 17 C.F.R. § 240.21F-2 (retaliation prohibited if employee has a “reasonable belief” related to a “possible securities law violation” and reports this information to the SEC).
13. SEC Commentary on Final Rule, 76 Fed. Reg. 34300, 34322 (June 13, 2011).
14. The SEC rules encouraging employees utilization of internal compliance programs (and permitting employees to qualify for rewards based on those internal complaints) are set forth as follows: i) 17 C.F.R. § 240.21F-4(b)(5), *fully discussed in* 76 Fed. Reg. 3400, 34365 (whistleblower an “original source” entitled to a reward if his or her employer “self-reports” information the SEC that the whistleblower initially reported to the company); ii) 17 C.F.R. § 240.21F-4(b)(7) (whistleblower who provided information internal compliance program

considered an "original source" for qualifying for a reward); iii) 17 C.F.R. § 240.21F-4(c)(3) (information provided to a company's internal compliance program that results in a company self-reporting a violation will be credited to the whistleblower as constituting "information that leads to successful enforcement" of the law) and; iv) 17 C.F.R. § 240.21F-6(a)(4) (reward can be increased if employee first reported to internal compliance).

15. See, SEC Office of the Whistleblower Q&As, printed at www.sec.gov/whistleblower.
16. 76 Fed. Reg. 34300, 34326.
17. See SEC Rules 17 C.F.R. § 240.21F-4(b)(4)(iii) and (b)(4)(v).
18. 17 C.F.R. § 240.21F-4(b)(4)(iii)(A)-(D).
19. 17 C.F.R. § 240.21F-4(b)(4) (v)(A)-(C).
20. 76 Fed. Reg. 34300, 34362.
21. 76 Fed. Reg. 34300, 34326 and 34362.
22. NWC, *Impact of Qui Tam Laws on Internal Compliance, A Report and Supplemental Rulemaking to the Staff of the SEC*, p.60 (January 25, 2011), <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/1.25.2011lettertoschapirochevron.pdf>.
23. 76 Fed. Reg. 34300, 34362 (emphasis added).

SEC Confirms that It Will Not Seek Judicial Review of Court Decision Vacating Its Proxy Access Rule

SEC Also Confirms its Stay Will Be Lifted on Rule 14a-8 Amendments Permitting Proxy Access Shareholder Proposals

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On July 22, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Securities and Exchange Commission's (SEC's) proxy access rule, Rule 14a-11.¹ As adopted by the SEC, Rule 14a-11 would have provided shareholders with an alternative means to nominate and elect directors as it would have required companies to