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Weil

Alert

SEC Disclosure and Corporate Governance

Dodd-Frank Update:

SEC Adopts Whistleblower Rules, Changing the Landscape for Corporate Compliance Programs and Enforcement

Last week, the Securities and Exchange Commission voted three to two to approve new Regulation 21F implementing the whistleblower bounty program and anti-retaliation provisions mandated by Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[1] Regulation 21F will take effect 60 days after publication in the Federal Register. The SEC anticipates an effective date of August 12, 2011. The most controversial aspect of the proposed regulation was the absence of a requirement that corporate whistleblowers report internally before going to the SEC. While the final regulation does not require this, it enhances the incentives for whistleblowers to do so.

The SEC's new whistleblower complaint program will be administered by the newly created Office of the Whistleblower residing within the Division of Enforcement. Under this program, an eligible individual (but not a corporation or other entity) may receive a cash award from a special SEC fund ranging from 10% to 30% of the total amount of monetary sanctions, in excess of $1 million, recovered by the SEC in a civil judicial or administrative action. An eligible whistleblower also may receive a cash award based on monetary sanctions collected by other regulatory or law-enforcement authorities in a "related action," including fines and penalties imposed in a federal criminal prosecution brought by the U.S. Department of Justice.[2] To recover, a whistleblower must "voluntarily" provide, in accordance with specific rules, "original information" about a violation of the federal securities laws that has occurred, is ongoing or is about to occur and that ultimately "leads to successful enforcement action."[3] While until now the SEC could only offer financial incentives to tippers in the area of insider trading, the new whistleblower program provides bounties for information relating to *any* violation of the federal securities laws, including the Foreign Corrupt Practices Act.

Companies should keep in mind that the whistleblower anti-retaliation provisions – which are enforceable by the SEC as well as by aggrieved whistleblowers – are broader in scope than the recovery provisions. The protections against retaliation apply even if a complaint does not result in a Commission enforcement action or the whistleblower ultimately fails to receive an award, and the protections apply even if the whistleblower never goes to the Commission but makes statements protected by the Sarbanes-Oxley Act of 2002.[4]

This Alert focuses on the new whistleblower rules from the perspective of boards of directors, senior executives and compliance personnel who face considerable challenges in keeping compliance programs premised on internal reporting viable in the face of the new bounty system. Boards should encourage executives and compliance personnel to review and strengthen the company's compliance culture and procedures to increase

the odds that employees will report to the company first, enabling the company to determine whether a problem exists and take necessary action, which may include in appropriate circumstances self-reporting to the SEC. Efforts should be made to communicate, at every opportunity, the positive message that internal reporting is critical to the company's success, and that it is both expected and valued. In light of the strict prohibition against retaliation contained in Regulation 21F, directors, executives, managers and HR and compliance personnel should be refreshed as to what forms of conduct may constitute retaliation for purposes of both Dodd-Frank and Sarbanes-Oxley. Equally important, existing procedures designed to protect employees against retaliation should be reviewed and updated as appropriate.

Highlights of the New Whistleblower Rules

Internal Reporting Incentivized But Not Required

Critics of the SEC's proposed rules argued that the effectiveness of corporate compliance programs would be seriously impaired by the bounty program, since it would encourage employees to bypass these internal programs and report directly to the SEC in order to be first in line to collect a substantial whistleblower award. Although the final rules do not mandate that whistleblowers report internally as a condition to receiving an award, the majority of Commissioners who voted to adopt Regulation 21F asserted that the new rules include sufficient incentives for people to report internally without undermining the central purpose of Section 21F: "to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program."[5]

As discussed in greater detail below, the final rules:

- extend to 120 days the period of time during which a whistleblower who first reports information internally can wait before having to submit the same information to the Commission so as to be eligible for a potential award as of the time the internal report was made,
- attribute to a whistleblower who first reports internally *all* information subsequently reported by the company to the Commission following an internal investigation, and
- clarify that, when determining the amount of an award, the Commission will take into account whether the whistleblower participated in or, alternatively, hindered a company's internal compliance program.

The impact of the new rules on corporate compliance programs is the most controversial aspect of Regulation 21F. It remains to be seen whether the enhanced incentives described below will successfully promote internal reporting – or whether the concerns expressed by the two dissenting Commissioners and many of those who commented on the proposed rules will be realized.

120-Day Lookback

The final rules extend – from 90 to 120 days – the lookback period for an award based on information that a whistleblower reported internally before reporting to the Commission's Office of the Whistleblower pursuant to the procedures outlined in Regulation 21F. As a result, a whistleblower who first reports a possible violation through a company's internal compliance program will have 120 days to make a subsequent report to the Commission and still retain eligibility for an award using the earlier internal reporting date as the date of submission. This preserves the whistleblower's "place in line" vis-a-vis other potential whistleblowers. Even if a second whistleblower has made a submission that causes the Commission to initiate an investigation into the same matter after the first whistleblower's initial internal report but prior to his or her subsequent report to the Commission, the whistleblower who had first reported internally will be given priority with respect to any whistleblower award.

Attribution of Information

The final rules expand the scope of the information that will be attributed to a whistleblower who utilizes the company's internal compliance mechanisms. Specifically, Rule 21F-4 provides that if: (1) a whistleblower

makes a report internally before, or at the same time as, he or she reports to the Commission; (2) the company provides the Commission with the whistleblower's information or with the results of an investigation initiated in response to the whistleblower's information; and (3) the information provided by the company to the Commission led to a successful enforcement action, then *all* of the information provided by the employer to the Commission may be attributed to the whistleblower, subject to certain conditions set forth in Rule 21F-4(c). Thus, a whistleblower may recover an award based on self-reporting by a public company even if he or she first reports one possible violation of the federal securities laws to the company in accordance with internal whistleblower complaint procedures and the company, after conducting its own internal investigation, finds additional potential violations and self-reports to the SEC. It may be possible that a whistleblower whose information alone would not have met the requirements for an award could, when his or her information is combined with the employer's additional information, qualify for an award.[6]

Increasing the Award

The final rules also include a direct financial incentive for not bypassing the company's internal compliance program. Under the framework for determining awards, a higher award will be appropriate when a whistleblower reports information internally, and a lower award will be appropriate when he or she hinders the effectiveness of the company's internal compliance program (although the contours of "hindering effectiveness" have not yet been established). A whistleblower will not be entitled to any award if he or she intentionally furnishes a false report to the SEC.[7]

Who Qualifies as a "Whistleblower"?

Under Rule 21F-2(a), whistleblower status for purposes of the bounty program is conferred upon any individual who either alone, or "jointly with others," provides the SEC "voluntarily" with "original information" relating to a possible violation of the federal securities laws (including the SEC's rules and regulations thereunder) that "has occurred, is ongoing, or is about to occur." The bar here is relatively low – the information submitted by the whistleblower "should indicate a facially plausible relationship to some [federal] securities law violation – frivolous submissions would not qualify for whistleblower status."[8] In addition, the whistleblower must follow the procedures outlined in the new rules for submission of a report to the SEC. If a potential whistleblower wishes to submit an anonymous report to the SEC, he or she must hire an attorney to report on his or her behalf – and there appears to be a proliferation of law firms advertising their services in this regard.

Although employees, agents and even individuals who do not work for a company are eligible to be whistleblowers, institutional shareholders, non-governmental organizations and other entities are not. In addition, as discussed below under "What is 'Original Information'?," information provided by certain individuals is automatically disqualified for policy reasons (subject to exceptions) – these individuals include internal compliance personnel, inside and outside corporate counsel and a company's outside auditors.

In the interest of encouraging high quality tips, the SEC decided to allow culpable individuals to be eligible for whistleblower awards despite concerns from commenters. The degree of culpability will be taken into account in setting a potential award. Individuals who include false information in the new SEC form for tip submission will, on the other hand, be subject to prosecution for perjury and ineligible for an award.

When is a Whistleblower Submission Considered "Voluntary"?

Under Rule 21F(b)(1), a whistleblower must "voluntarily" submit original information to the SEC in order to recover a bounty. This requires that the whistleblower come forward before he or she (or his or her attorney or other representative) receives a request, inquiry or demand – whether made pursuant to a subpoena or an informal request for production – relating to the subject matter of the whistleblower's submission to the SEC from any of the following: (1) the SEC itself; (2) the Public Company Accounting Oversight Board or any self-regulatory organization (e.g., FINRA); (3) Congress or any other authority of the federal government (e.g., the CFTC), or (4) a state Attorney General or securities regulator.[9]

A submission will not be considered "voluntary" if the putative whistleblower is subject to a pre-existing legal or contractual duty to report information on possible federal securities law violations to the SEC or certain other authorities,[10] or to a similar duty arising out of a judicial or administrative order.[11]

In a significant departure from the proposed rules, the SEC decided to treat as "voluntary" complaints from individual employees who are not otherwise disqualified, even if the company itself previously received a formal or informal demand from the SEC (or one of the other designated authorities) about any matter relevant to the individual's submission.[12] The SEC warned, however, that "individuals who wait to make their submission [to the SEC] until after a request is directed to their employer will not face an easy path to an award."[13]

What is "Original Information"?

Under Rule 21F-4(b), to qualify for the program, the whistleblower must provide "original information" to the Commission.[14] Original information must be derived from a whistleblower's "independent knowledge" or "independent analysis." Independent knowledge refers to factual information in a whistleblower's possession that is not derived from publicly available sources. Examples include "experiences, communications and observations [made by the whistleblower] in … [his or her] business or social interactions." Independent analysis refers to a whistleblower's own "examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public." This analysis may be conducted alone or in combination with others.[15]

The final rules exclude from the scope of "original information" information obtained from a communication that is protected by the attorney-client privilege or obtained in connection with the individual's legal representation of a client, unless an attorney would be permitted to disclose the information pursuant to specified ethical obligations set forth in the SEC's "up-the-ladder" attorney conduct rule,[16] and/or applicable state bar ethical rules (e.g., that include the "crime-fraud" exception). These exclusions apply both to internal and external counsel and to non-attorneys working in corporate legal departments and law firms.

For policy reasons, the final rules also exclude from the scope of "original information" information obtained by: (1) an officer, director, trustee, or partner who either was informed by another person of allegations of misconduct or learned the information in connection with the company's internal compliance program; (2) an employee of the company (or of a firm retained by the company) whose principal duties involve compliance or internal audit; (3) a person associated with a firm retained to conduct an internal investigation into possible violations of law; (4) a person associated with a public accounting firm, where the information surfaced through an audit or other engagement mandated by the federal securities laws and relates to a violation by the engagement client or the client's directors, officers or other employees; or (5) a means that violates applicable federal or state criminal law.[17] However, in what one dissenting Commissioner indicated might be exceptions that may swallow the rule, the SEC provided the following carve-outs from these exclusions:

- when the person has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the company from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the company or investors;
- when the person has a reasonable basis to believe that the company is engaging in conduct that will impede an investigation of the misconduct (e.g., destroying documents, improperly influencing witnesses, or engaging in other improper conduct); or
- when at least 120 days have elapsed since either (1) the person provided the information to the audit committee, chief legal officer, or chief compliance officer (or their equivalents), or to his or her supervisor; or (2) the person received the information, if he or she received it under circumstances indicating that the company's audit committee, chief legal officer, chief compliance officer (or their equivalents), or his or her supervisor was already aware of the information.

When Will Original Information be Deemed to Have Led to a Successful Enforcement Action?

Rule 21F-4(c) outlines factors that the Commission will consider in determining whether an individual's submission of original information will be deemed to have "led to" a successful enforcement action. As under the proposed rules, the final rules apply different standards depending on whether the information reported concerns conduct that is, or is not, already under investigation or examination by the Commission itself, or by the Congress, any other authority of the federal government, a state Attorney General or securities regulator, a self-regulatory organization or the PCAOB.

Where the Conduct is Not Under Investigation or Examination: Information regarding conduct not under investigation or examination will be considered to have led to successful enforcement when (1) the information is "sufficiently specific, credible and timely" to cause the Commission staff to commence a new investigation, to reopen a closed investigation or to inquire about different conduct under a current investigation; and (2) the Commission brings a successful action based in whole or in part on the conduct identified in the original information. The Adopting Release notes that the "sufficiently specific, credible and timely" standard was adopted to help ensure that the Commission receives only "high-quality tips . . . [meaning those] most likely to lead to a successful enforcement action."[18]

Where the Conduct Already is Under Investigation or Examination: Information regarding conduct already under investigation or examination will be considered to have led to successful enforcement when the information "significantly contributed" to the success of the Commission action. The Adopting Release notes that the Commission will consider, among other things, whether the information allowed the Commission to bring a successful action in significantly less time or with significantly fewer resources, or enabled the Commission to bring additional successful claims, or successful claims against additional individuals or entities. The Adopting Release also notes, however, that this standard is not intended to reward a whistleblower for obstructing an ongoing investigation in an effort to obtain an award.

Anti-Retaliation Provisions

As Rule 21F-2(b)(iii) makes clear, the anti-retaliation provisions apply whether or not an aspiring whistleblower satisfies the requirements, procedures and conditions to qualify for an award. He or she need only have a "reasonable belief" that the information provided related to a possible violation of the federal securities laws or any other laws within the scope of the Sarbanes-Oxley anti-retaliation provisions. To qualify as a "reasonable belief," two criteria must be met: (1) the employee had a "subjectively genuine belief that the information demonstrates a possible violation;" and (2) the belief itself is objectively reasonable, meaning that it is one that a "similarly situated employee might reasonably possess."[19]

Employers are prohibited from taking a wide range of adverse actions – discharging, demoting, suspending, threatening, harassing directly or indirectly, or discriminating in any other manner – "because of any lawful act done by the whistleblower" in connection with: (1) providing information to the Commission; (2) participating in any investigation or action undertaken by the Commission based on or related to information provided by the whistleblower; or (3) making disclosures required or protected by Sarbanes-Oxley or any other law, rule, or regulation subject to the jurisdiction of the Commission. The disclosures protected by Sarbanes-Oxley are extremely broad and do not require any external reporting (i.e., to the Commission). For example, Section 806 of Sarbanes-Oxley protects disclosures made to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)," assuming that certain requirements are met.

Suits by whistleblowers for retaliation brought under Dodd-Frank may be more significant than those brought under Sarbanes-Oxley. First, suit may be brought directly in federal district court without filing first with the Department of Labor, as required by Sarbanes-Oxley. Second, whistleblowers are entitled under Dodd-Frank to twice the amount of back pay otherwise owed, while only back pay is available under Sarbanes-Oxley. Third, the statute of limitations is considerably longer under Dodd-Frank: suit must be brought within six years, or three years from when "facts material to the right of action are known or reasonably should have been known," but in

no event more than ten years after the date of the violation. In contrast, whistleblowers pursuing claims under Sarbanes-Oxley must file a claim with the Secretary of Labor within 180 days of the violation or the date on which the employee becomes aware of the violation.

In addition to suits brought directly by whistleblowers for retaliation, the SEC can pursue alleged violations of the Dodd-Frank anti-retaliation provisions.

Enforcement Implications

Under the new rules, companies will need to be prepared for a variety of possible enforcement scenarios, including the following: (1) the whistleblower complains to the company but does not immediately go to the SEC; (2) the whistleblower complains to the company and the SEC simultaneously; or (3) the whistleblower complains to the SEC without notifying the company. Of course, if the whistleblower does not notify the company, the company cannot investigate the issue unless and until the SEC brings the matter to its attention. Historically, when it has received tips and complaints about potential wrongdoing, the Enforcement staff generally has given companies the opportunity to "investigate and report back" and has evaluated their actions under the Seaboard factors.[20] The Adopting Release suggests that the Commission expects this approach to continue in the future.[21] However, questions undoubtedly will arise in practice. For example, given the whistleblower's statutorily-protected role, how much deference will the SEC give to a whistleblower's demand that the SEC not bring the matter to the company's attention in order to protect the whistleblower's identity? Moreover, the Enforcement staff will have wide latitude in administering the program. The Adopting Release notes a number of factors the SEC "may consider" in determining whether to follow its general approach in a particular case. These include "information [it has] concerning the nature of the alleged conduct, the level at which the conduct allegedly occurred, and the company's existing culture related to corporate governance" as well as "information [it has] about the company's internal compliance programs, including what role, if any, internal compliance had in bringing the information to management's or the Commission's attention."[22]

Even if the whistleblower brings his or her complaint to the company first, given the 120-day lookback period, the company faces an uncertain process. Since the company must assume that the whistleblower will bring his or her complaint to the SEC by the 120th day, the company must act expeditiously with respect to the complaint and attempt within that period to determine whether it is meritorious.[23] If the complaint appears to have merit, it will make strategic sense in most cases to alert the SEC before the 120-day clock expires. Indeed, there would seem to be few cases in which there is strategic advantage to waiting for the SEC to approach the company upon receipt of a complaint that the company has determined is meritorious or, at a minimum, raises legitimate issues requiring further inquiry.

There are many nuances to this issue, however, including when to make the initial report and whether to make it when the initial inquiry shows the allegation to be unmeritorious. There will surely be many situations in which a company has, on day 120, not been able to make any definitive conclusions about the allegations yet believes the issues are serious and credible. In this circumstance, there is a strong argument that the company should make some disclosure to the SEC, with the caveat that the investigation is ongoing. Similarly, there may be circumstances in which it is clear or arguable that even earlier disclosure to the SEC is warranted and strategically prudent. This analysis should turn on the gravity and materiality of the initial allegation (including whether senior management and/or board members are the subject of the allegation), the degree to which the initial findings of the inquiry are problematic, and whether the company is uncertain as to when and whether the whistleblower may make his report to the SEC (and/or the DOJ, which may notify the SEC). The overarching goal must be to avoid, to the extent possible, playing defense or "catch-up" on the issue. The SEC is much more likely to be persuaded as to the merits of the company's position on an issue if it believes the company or, where appropriate, the audit committee or board has proactively and thoroughly examined it.

But this is not to say that all whistleblower complaints will or should result in the company self-reporting the issue to the SEC. There certainly will be situations in which self-reporting is not warranted, even though it may be only a matter of time before the SEC learns of the complaint. Thus, where a complaint lends itself to a contained investigation that reveals the complaint to be entirely unmeritorious, self-reporting to the SEC should

not be automatic.[24] In such cases, it is hard to imagine that the SEC staff would be disappointed if the company failed to bring it a full-blown report of the complaint and investigation (provided, of course, that the company otherwise addressed the complaint in an appropriate manner). Rather, the company should fully document the nature and scope of the investigation and the involvement, where appropriate, of the audit committee or board and be prepared, if and when the SEC comes calling, to walk the staff through the issues or, as appropriate, to provide the staff a written summary of the issue and investigation. In pursuing this course, however, the company should consider the potential for the SEC staff to disagree with the company's view of the nature and gravity of the complaint and the manner of its disposition. Given their statutory mandate, the staff may read the complaint more broadly than the company may have. Moreover, the staff may have been given documents and information by the whistleblower directly, which the company may not have or may not be aware of. This is most likely to occur where the whistleblower remains anonymous.

These issues are even more complicated for registered broker-dealers and other financial institutions subject to regulation by FINRA. New FINRA Rule 4530, which goes into effect on July 1, 2011, *requires* member firms to report within *30 days* any conclusions by the firm that it or an associated person within the firm violated securities laws where the conduct had "widespread or potential widespread impact to the member, its customers or the markets, or conduct that arises from a material failure of the member's systems, policies or practices involving numerous customers, multiple errors or significant dollar amounts." Firms may conclude that they are required to report the conclusions of an internal investigation instigated by a whistleblower provision to FINRA under Rule 4530, even though a report to the SEC would have been discretionary.

In sum, new Regulation 21F is likely to change the landscape in the enforcement area – with the unknown variable being, in these early days, how much flexibility the SEC and its staff will display in administering these rules. The rules create an environment where any employee (or other individual who does business with the company) who believes he or she has knowledge about a possible federal securities law violation is highly motivated to report the information to the agency. Therefore, the best line of defense is for a company to have in place robust internal compliance and audit procedures designed proactively to uncover potential wrongdoing and, where misconduct is found, to promptly address and remediate it aggressively before any whistleblower surfaces. Where the company learns of credible allegations of misconduct from a whistleblower, it should immediately investigate and, where the claims are credible, consider whether and when to report to the SEC.

What to do Now

- Reexamine existing whistleblower policies and procedures to ensure they emphasize the value the company places on employees coming forward with concerns and that the policies and procedures are easy to understand and follow. Many policies adopted after Sarbanes-Oxley limited the availability of the anonymous, confidential employee hotline and other internal complaint procedures to accounting and auditing matters within the audit committee's purview. Consider broadening such policies to cover all possible violations of the federal securities laws and encouraging employees to use confidential internal hotlines and complaint mechanisms for any such matters (particularly where employees are seeking anonymity and confidentiality). While there is no requirement that whistleblower policies refer to the bounty program, companies should be prepared to answer questions about the program from their employees. In doing so, it is appropriate to mention the incentives provided for internal reporting but care must be taken to avoid, whether expressly or implicitly, discouraging individuals from reporting directly to the SEC if they so desire.[25]
- Reexamine existing policy assurances of protection against retaliation, along with guarantees of anonymity and confidentiality, in light of the new private right of action and the SEC's ability (and stated intent) to enforce the Section 21F anti-retaliation provisions.
- Review and strengthen existing procedures to prevent retaliation or the appearance of retaliation. Any performance management or disciplinary action against a whistleblower should be reviewed first by HR and legal. HR and legal should satisfy themselves that any such action is being taken for non-retaliatory reasons, including ensuring that others similarly situated are being treated in a similar fashion. HR and legal also should be involved in decisions concerning compensation, performance reviews and promotion to ensure

that whistleblowers do not have any legitimate claim that they are being treated less favorably because they came forward with concerns. It is useful to set up a direct line of communication between whistleblowers and HR so that whistleblowers can flag immediately any situation where they feel that they are being treated inappropriately, such as not being invited to a client or networking event.

- Review and strengthen existing procedures for logging, evaluating, investigating, signing off and, where appropriate, responding to complainants on the disposition of complaints. Do not apply a "materiality" filter in assessing the merits of a particular employee complaint regarding a possible federal securities law violation, given the SEC's express rejection of such a standard for purposes of Regulation 21F. And be careful when dismissing as a potential whistleblower complaint one that may appear on the surface to more clearly implicate HR or other concerns unrelated to the federal securities laws.
- Take a holistic approach to reexamining the effectiveness of internal compliance polices and procedures. Various provisions in broad ethics policies could relate to potential federal securities law or federal commodities law violations (e.g., procedures regarding treatment of sensitive business information, Regulation FD and insider trading and anti-tipping compliance policies, disclosure controls and procedures, internal control over financial reporting and foreign and domestic anti-bribery provisions). The parameters of what the SEC, CFTC and DOJ consider to be state-of-the-art compliance policies and procedures – for example, in making initial charging decisions (or, in the case of DOJ, making sentencing recommendations) – necessarily will evolve over time depending upon how the Commission administers the whistleblower rules as part of its broader, revamped Enforcement program. Therefore, a re-examination process should be conducted at regular intervals (or more frequently as applicable laws, rules and regulations and relevant case law change), with the results reported to the appropriate committee of the board of directors or the full board.
- Finally, consider "cultural measures" to encourage internal reporting of possible securities law violations, such as:
  - Thoroughly investigating any complaints that are lodged via internal complaint processes, whether or not made anonymously, to demonstrate the company's commitment to maintaining a strong compliance program;
  - Considering the appointment of a chief compliance officer, and empowering that individual by giving him or her senior status accompanied by a straight or dotted line to the Board or audit committee (similar to the current status, in many companies, of the head of internal audit);
  - Regularly communicating with and providing meaningful training for employees about internal compliance policies and procedures and complaint mechanisms, including, for supervisors, how to address concerns brought to them; and
  - Reinforcing the company's culture of compliance by continually enhancing the "tone at the top." The new rules create one more important incentive for boards of directors, CEOs and other members of top management to make clear through their conduct and communications that they take compliance very seriously and are subject to the same requirements as all employees.

Endnotes

1 Section 922(a) added new Section 21F to the Securities Exchange Act of 1934, as amended ("Exchange Act"), which the SEC implemented via new Regulation 21F (17 CFR 240.21F-1 through 240.21F-16). See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, SEC Rel. No. 34-64545 (May 25, 2011) ("Adopting Release"). Other provisions of Section 21F enhance the whistleblower remedy provided by Section 806 of the Sarbanes-Oxley Act of 2002 (codified in Section 1514A of Title 18 of the United States Code), and prohibit contractual waivers of whistleblower rights and remedies. Section 748 of the Dodd-Frank Act similarly charges the Commodity Futures Trading Commission with implementing rules providing similar whistleblower incentives and anti-retaliation protections in connection with tips of possible violations of the Commodity Exchange Act. See note 2, below.

2 One example would be civil and criminal proceedings arising out of the same foreign governmental payments brought under the

Foreign Corrupt Practices Act by, respectively, the SEC and the DOJ. There is one important exception to the regulatory definition of "related action" that prevents "windfall" awards – a whistleblower may not obtain an award from the SEC if he or she has "already been granted an award by the [CFTC] for that same action pursuant to its whistleblower award program under Section 23 of the Commodity Exchange Act .... Similarly, if the CFTC has previously denied an award [to a whistleblower] ... in a related action, [he or she] will be precluded from relitigating any issues before the [SEC] that the CFTC resolved against [that individual] as part of the award denial." Note 3 to Rule 21F-3(b).

3 Each of the terms appearing in quotations is defined in Regulation 21F.

4 See Section 21F(h)(1) and Rule 21F-3(b).

5 Adopting Release at 90.

6 Adopting Release at 101-102.

7 Section 21F(i) and Rule 21F-8(c)(7).

8 Adopting Release at 13.

9 Such an individual would not be precluded from recovering if the prior submission of the same information to another regulatory or law enforcement authority is voluntary. Rule 21F-4(a)(2). Nor is an award to such an individual precluded in connection with his or her voluntary reporting of an "unrelated" securities law violation to the SEC. To illustrate, the SEC describes a situation where a whistleblower received an inquiry from the Enforcement Division focusing on a possible accounting fraud – additional information from that person regarding a different but related fraudulent accounting practice that is part of a single earnings manipulation scheme would not be "voluntary". However, the individual "could still make a 'voluntary' submission that described other, unrelated violations (e.g., [under] the Foreign Corrupt Practices Act ....)." Adopting Release at 35.

10 The SEC indicated that such a duty can arise from a contract (e.g., a cooperation agreement) either with the SEC itself, the Department of Justice or certain other federal or state authorities. Adopting Release at 37-38.

11 This language is intended to cover independent monitors or consultants who are either appointed or retained as a result of SEC or other proceedings, and are required to report their findings, conclusions or other information to the SEC. See Adopting Release at 38.

12 The Adopting Release offers an example (at 31) in which a registered broker-dealer or investment adviser received an examination request from the SEC staff. Here, an individual employee still would be eligible for a whistleblower award with respect to a submission to the SEC of information relevant to the subject-matter of the exam, provided that he or she had not been interviewed by SEC staff examiners.

13 The SEC emphasized that it expects to scrutinize whether such submissions "significantly contributed" to a successful enforcement action under Rule 21F-4(c)(2) in view of the previous request to the employer. Adopting Release at 31 n. 73.

14 The information must be provided to the SEC for the first time after July 21, 2010 (the date of Dodd-Frank's enactment).

15 In addition, to be "original," information may not already be known to the Commission from any other source (unless the whistleblower is the original source) and may not exclusively be derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media (unless the whistleblower is a source of the information).

16 See Adopting Release at 56 n. 119, discussing Commission Rule 205.3(d)(2).

17 This exclusion does not establish a general bar against officers, directors, and other designated persons becoming whistleblowers any time they observe possible violations of the federal securities laws at a company or other entity, but rather focuses on the context in which they obtain information regarding possible violations.

18 Adopting Release at 99.

19 Adopting Release at 16.

20 See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001).

21 Adopting Release at 77 and 92.

22 Adopting Release at 92 n. 197. Presumably the SEC means that, where the whistleblower indicates that he or she has previously but unsuccessfully raised the issue with the company, the SEC is unlikely to permit the company thereafter to conduct its own investigation of the matter. It is critical, therefore, that companies ensure that complaints do not "fall through the cracks" and that the process followed and conclusions reached with respect to all complaints are carefully documented.

23 In this regard, the SEC observed that it does "not intend to suggest that an internal investigation should in all cases be completed before an entity elects to self-report violations, or that 120 days is intended as an implicit 'deadline' for such an investigation." Adopting Release at 77.

24 Under an alternative scenario, a particular complaint may have merit without implicating a possible violation of the federal securities laws. In this situation, the company should be aware that if the employee reports the matter to the SEC staff within the requisite 120-day period, the staff may contact the appropriate regulatory or law-enforcement authority without necessarily alerting the company.

25 Because a parallel whistleblower bounty recovery and anti-retaliation regime has been codified in the Commodity Exchange Act, as discussed above in notes 1 and 2, companies likewise should reexamine their policies and procedures for addressing violations of the federal commodities laws and be prepared for questions relating to the CFTC-administered bounty program established to handle tips relating to possible violations of that Act. Such tips may focus, for example, on the new Dodd-Frank swaps provisions under the CFTC's jurisdiction, as well as the security-based swaps provisions amending the Exchange Act that will be enforceable by the SEC.

If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or any of the following:

Public Company Advisory Group

Howard B. Dicker	(howard.dicker@weil.com)	+1 212 310 8858
Catherine T. Dixon	(cathy.dixon@weil.com)	+1 202 682 7147
Holly J. Gregory	(holly.gregory@weil.com)	+1 212 310 8038
P.J. Himelfarb	(pj.himelfarb@weil.com)	+1 202 682 7197
Ellen J. Odoner	(ellen.odoner@weil.com)	+1 212 310 8438

Enforcement/Investigations

Christian R. Bartholomew	(christian.bartholomew@weil.com)	+1 202 682 7070
William Burck	(bill.burck@weil.com)	+1 202 682 7002
Jonathan D. Polkes	(jonathan.polkes@weil.com)	+1 212 310 8881
Steven Tyrrell	(steven.tyrrell@weil.com)	+1 202 682 7213

Employment Litigation

Allan Dinkoff	(allan.dinkoff@weil.com)	+1 212 310 6771
Jeffrey S. Klein	(jeffrey.klein@weil.com)	+1 212 310 8790

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