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SEC Issues Final Rules Implementing the Whistleblower Program Under Dodd-Frank

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On May 25, 2011, the U.S. Securities and Exchange Commission approved final rules to implement the whistleblower program, which rewards individuals whose reports of violations of U.S. federal securities laws lead to successful enforcement actions.

The rules are mandated by Section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) and are effective 60 days from publication in the Federal Register. Prior to the Dodd-Frank Act, the SEC's reward program for whistleblowers was limited to insider trading cases, and the amount of an award was a maximum of 10% of the monetary sanctions obtained in the case.

There is no exclusion for foreign private issuers or other non-U.S. persons. All companies with a U.S. listing or securities registration (including foreign companies) should consider the potential impact of the new rules on their internal compliance systems and reporting procedures.

Summary of Key Provisions

The SEC will reward eligible whistleblowers who voluntarily provide it with original information about violations of any provisions of U.S. federal securities laws that lead to a federal court or an administrative action where the SEC obtains monetary sanctions totaling more than US\$1 million. The whistleblower will be eligible to receive 10% to 30% of the recovered sanctions. In determining the appropriate award percentage, the SEC will consider factors such as the significance of the information and the assistance provided by the whistleblower, culpability of the whistleblower and any interference with internal compliance and reporting systems by the whistleblower. The SEC will also pay an award based on amounts collected in related actions brought by the Attorney General of the United States, certain U.S. regulatory authorities and self-regulatory organizations.

Retaliation against whistleblowers is generally prohibited. To be protected, a whistleblower must have a reasonable belief that the information provided to the SEC relates to a possible violation of the U.S. federal securities laws. Such protection will apply whether or not the company is found to have violated the law or the whistleblower ultimately qualifies for an award.

Whistleblowers are defined. The rules define a "whistleblower" as an individual who "alone or jointly with others, provides the SEC with ... information that relates to a possible violation of the federal securities law that has occurred, is ongoing, or is about to occur." An individual who submits information that relates only to a state law or a foreign (non-U.S.) law violation would not satisfy the whistleblower definition. A company is not eligible to be a whistleblower.

Generally, certain persons will not be eligible for whistleblower awards, including attorneys whose information is obtained through representing a client (unless such

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information can be disclosed under state bar rules) or through compliance or audit personnel of a company (including outside consultants) whose information is obtained because of their positions. However, compliance or audit personnel may be entitled to an award if (i) they have a reasonable basis to believe that disclosure is necessary to prevent conduct that is likely to cause substantial injury to the financial interest or property of the company or its investors; (ii) they have a reasonable basis to believe that the company is engaging in conduct that will impede an investigation; or (iii) at least 120 days have passed since they provided the information to the company (or since receiving the information under circumstances indicating that the company's audit committee, chief legal or compliance officer or their supervisor was already aware of the information). In addition, agents of a foreign government, such as employees of a foreign securities regulator, are not eligible for an award.

Submission must be voluntary. The rules state that the submission of information to the SEC is deemed "voluntary" if the whistleblower submits the information before a request, inquiry or demand for the information from the SEC (or certain other U.S. regulators) is directed at the whistleblower or anyone representing the whistleblower, such as an attorney.

Information submitted must be original. Under the rules, "original information" is information that is (i) derived from the whistleblower's independent knowledge or analysis; (ii) not already known to the SEC; (iii) not exclusively derived from an allegation in a judicial or an administrative hearing, in a government report, hearing, audit or similar action; and (iv) provided to the SEC for the first time after July 21, 2010.

Information must lead to successful enforcement. The SEC will reward a whistleblower only if the original information leads to "successful enforcement" of a judicial or administrative action in any of the following circumstances: (i) the original information was sufficiently specific, credible and timely to cause the SEC to start an examination or open an investigation and the SEC brought a successful judicial or administrative action based wholly or partly on conduct that was the subject of the original information; or (ii) the SEC had already started an examination or opened an investigation, but the submission of the original information significantly contributed to the success of the action.

Reporting Through Internal Compliance Systems

The rules do not require that whistleblowers report through their employer's internal compliance systems in order to be eligible for an award. However, the SEC has provided several incentives to encourage whistleblowers to utilize internal compliance systems before or at the same time as reporting to the SEC.

In determining the amount of an award, the SEC will consider a whistleblower's voluntary participation in an employer's internal compliance system. Voluntary participation will increase the amount of an award, whereas a whistleblower's interference with internal compliance systems can decrease the amount of an award.

The whistleblower may still receive an award if he or she reported the original information through an employer's internal compliance system before or at the same time as reporting the original information to the SEC and the employer later self-reports this original information to the SEC.

In addition, a whistleblower who reports information through the employer's internal compliance system has 120 days from the date of the internal compliance report to provide the same information to the SEC while remaining eligible for an award. If the whistleblower reports within this period, the SEC will consider the whistleblower to have provided the information at the same time as reporting through the employer's internal compliance system. **T**