



OVERVIEW OF THE DODD-FRANK SEC WHISTLEBLOWER INCENTIVE PROGRAM

PRESENTED BY:

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MAY 22, 2013

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SEC Office of the Whistleblower

- Administers the whistleblower program
 - Coordinates and tracks whistleblower complaints
 - Analyzes and reviews claims for whistleblower awards
 - Available to answer any questions that may arise in connection with the program
 - Office currently consists of Chief (Sean McKessy), Deputy Chief (Jane Norberg), nine attorneys and three paralegals
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Whistleblower Program – In General

- Whistleblowers (“WB”) who voluntarily provide the SEC with original information that leads to a successful enforcement action in which the SEC is awarded monetary sanctions of more than \$ 1 million may be eligible to receive an award of 10-30% of the monetary sanctions collected
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Whistleblower Program – In General

- Internal reporting is **not required** before submitting a tip to the SEC
 - Companies **cannot prohibit or impede** employees from reporting to the SEC
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How the Rules Foster Internal Compliance Programs

- Cooperation with internal compliance program is a positive factor in determining award percentage; interference with internal compliance is a negative factor
 - 120 day “look back” period saves place in line for award if WB reports internally first
 - WB credited with providing all original information received by SEC from a company that self reports based on a WB’s internal complaint
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Factors in Determining Award Amount

- Amount of award within the 10% to 30% range is in SEC's sole discretion

Factors that Increase Award:

- Significance of information to success of enforcement action
- Assistance of WB and counsel
- SEC's interest in deterring violations through WB awards
- Participation in internal compliance systems

Factors that Decrease Award:

- Culpability, including WB's role in violation, scienter, financial benefit, egregiousness of fraud committed by WB
 - Unreasonable reporting delay
 - Interference with internal compliance system
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Issues to Consider

- **Anti-Retaliation**
 - Generally, no employer may discharge, demote, suspend, threaten, harass, directly or indirectly . . . a whistleblower because the whistleblower provided information to, or participated in, a Commission action.
 - **Interference with Communications**
 - Rule 21f-17 says that “no person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . .”
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Whistleblower Directors Speak

Edward J. Riccobene
Commodity Futures Trading Commission
Associate Chief Counsel



Any opinions expressed here are those of Mr. Riccobene only and do not necessarily reflect the views of the CFTC, any of its Commissioners, or any of its staff.

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Whistleblower Directors Speak

CFTC Whistleblower Program – Broad Strokes

Section 23 of the Commodity Exchange Act requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who **voluntarily** provide the Commission with **original information** about violations of the Commodity Exchange Act that lead to an enforcement action resulting in more than \$1 million in monetary sanctions.

Authorities

Section 23 of the Commodity Exchange Act (CEA) [7 U.S.C. § 26]

SEC Equivalent: Section 21F of the Exchange Act of 1934 [15 U.S.C. § 78u-6]

Whistleblower Rules (Rules) [17 C.F.R. § 165]

SEC Equivalent: [17 C.F.R. § 240]

Preamble to the Whistleblower Rules [76 Fed. Reg. 53172 (Aug. 25, 2011)]

SEC Equivalent: [76 Fed. Reg. 34300 (June 13, 2011)]

Whistleblower Directors Speak

What is ‘original information?’

- “Independent knowledge” – information not generally known
- “Independent analysis” – examination and evaluation that reveals information not generally known or available
- Not already known to the CFTC, unless the whistleblower is the original source
- Not exclusively derived from certain public sources

Whistleblower Directors Speak

NOT 'independent knowledge'

- Sources generally available to the public
- Attorney-client privileged communications
- Information obtained "in connection with the legal representation of a client"
- Information obtained by a means "determined" to violate federal or state criminal law
- Whistleblower is an "officer, director, trustee, or partner" of the subject entity (under limited circumstances) *
- Whistleblower is an "employee whose principal duties involved compliance or internal audit" *

Exceptions *

- Whistleblower reasonably believes disclosure is needed to prevent the entity from causing substantial injury
- Whistleblower reasonably believes the entity is engaging in conduct that will impede investigation
- 120 days have passed since appropriate entity personnel learned of the information

Whistleblower Directors Speak

What does 'voluntarily' mean?

- information must be provided before the whistleblower receives a request, inquiry or demand from authorities
 - not limited to information compelled by subpoena or applicable law
 - includes information within the scope of request, inquiry or demand to an employer ... unless the employer fails to provide requested information “in a timely manner”
- Information also cannot be provided voluntarily if the whistleblower “is under a pre-existing legal or contractual duty” to report

Whistleblower Directors Speak

Significant policies in the rules

- Liberal definition of the term “whistleblower,” especially with respect to anti-retaliation
- Internal reporting guidelines
 - internal reporting is not required, but is incentivized
 - internal reporting is a factor that can increase the size of the award
 - interfering or hampering with internal compliance systems can reduce the size of an award
 - amount of information for which a whistleblower can receive credit may increase as a result of internal reporting
 - 120-day perfection requirement

Whistleblower Directors Speak

Anti-retaliation provisions

- No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower ...
 - in providing information to the CFTC, or
 - in assisting in any investigation or judicial or administrative action of the CFTC based upon or related to such information
- Whistleblower can bring an action in federal court
- Two-year statute of limitations
- Relief can include reinstatement, back pay, compensation for any special damages (including litigation costs, expert witness fees and attorney's fees)

Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Beth S. Slavet

United States Department of Labor
Occupational Safety and Health Administration
Director, Directorate of Whistleblower
Protection Programs

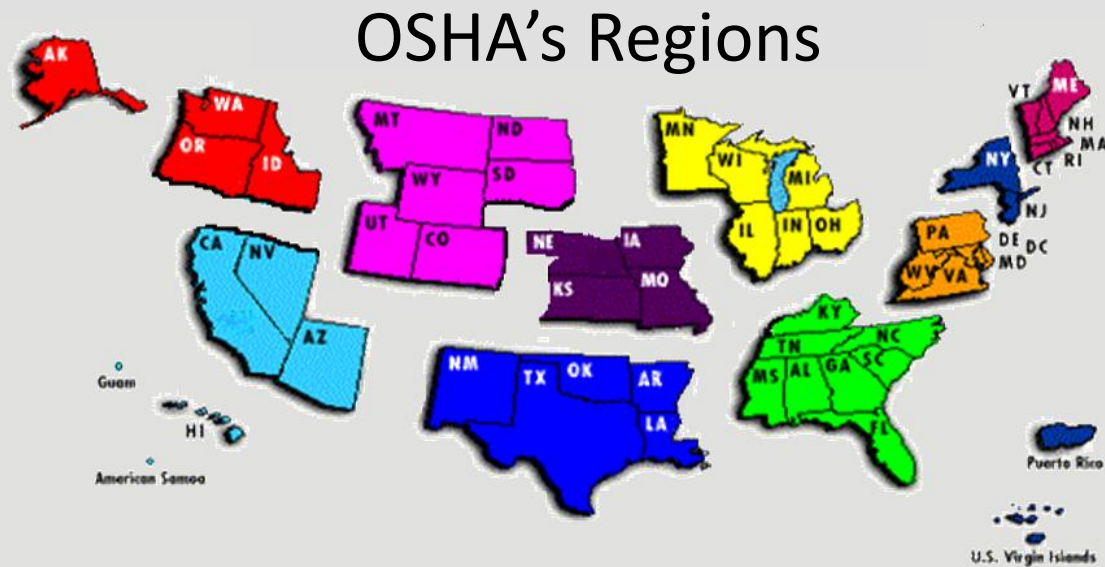


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Whistleblower Directors Speak: OSHA Whistleblower Protection Program

- 22 Statutes
- 155 Million Workers
- 10 Regions
- 100 Investigators
- 2800 Complaints



Whistleblower Directors Speak: OSHA's Whistleblower Protection Program

Financial Sector Whistleblower Protections

- Sarbanes Oxley Act (SOX), 18 U.S.C. §1514A
 - Complaints to the Audit Committee
- Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. §5567

Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Working with OSHA during the investigation

- Respond quickly
- Send copies of all documents submitted to OSHA to the Complaining Party
- Help set-up interviews of witnesses that the OSHA regional investigators wishes to interview
- Interviews of non-management workers are conducted in private.

Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Best practices for employers

- Ensure supervisors understand workers rights under SOX and CFPA
- Provide an environment where workers feel free to express concerns about violations of the law
- Document worker performance issues thoroughly
- Apply company policies uniformly

Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Resources:
www.whistleblowers.gov



THE WHISTLEBLOWER PROTECTION PROGRAM

Home | File a Complaint | Fact Sheets & Statistics | News & Updates | Statutes | Regulations & Directives | Contacts & Links

Home

OSHA's Whistleblower Protection Program enforces the whistleblower provisions of more than twenty whistleblower statutes protecting employees who report violations of various workplace safety, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws. Rights afforded by these whistleblower acts include, but are not limited to, worker participation in safety and health activities, reporting a work related injury, illness or fatality, or reporting a violation of the statutes.

Protection from Discrimination

Protection from discrimination means that an employer cannot retaliate by taking "adverse action" against workers, such as:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denial of benefits
- Failure to hire or rehire
- Intimidation
- Making threats
- Reassignment affecting prospects for promotion

Whistleblower News Bulletin

- December 13, 2012** Secretary of Labor announces new members of Whistleblower Protection Advisory Committee
- October 2, 2012** OSHA's Alternative Dispute Resolution pilot program for whistleblower complaints
- July 16, 2012** Memorandum of Agreement OSHA, Federal Railroad Administration sign agreement to protect workers from retaliation

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies					Appeal	Burden of Proof
					Engrve	Restitutory Reinstatement	Compensatory	Punitive	Days		
Section 11(c) of the Occupational Safety & Health Act (OSHA) (1970) (29 U.S.C. § 661(c)) Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a SAH complaint with OSHA or their employers, participating in an inspection, etc. 29 CFR 1977	30	Private sector U.S. Postal Service Certain tribal employers	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Asbestos Hazard Emergency Response Act (AHERA) (1986) (15 U.S.C. § 2551) Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems. 29 CFR 1977	90	Private sector State and local government Certain DoD schools Certain tribal schools	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
International Safe Container Act (ISCA) (1977) (46 U.S.C. § 80507) Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act. 29 CFR 1977	60	Private sector Local government Certain state government and interstate compact agencies	30	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Surface Transportation Assistance Act (STAA) (1982), as amended by the 911 Commission Act of 2007 (Public Law No. 110-053) (49 U.S.C. § 31105) Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations.	180	Private sector	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing

Directorate of Whistleblower
Protection Programs Desk Aid

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Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Section 1558 of the Affordable Care Act (ACA)

- Provides information to employer, federal government, or state's attorney general regarding conduct employee reasonably believes violates Title I (health insurance reforms) of ACA (or is about to do so)
- Testifies or assists in proceeding relating to violations of Title I of ACA (or is about to do so)
- Objects to or refuses to perform assigned task/activity that employee reasonably believes violates Title I of ACA
- Received a tax credit or subsidy under ACA for enrolling in a qualified health plan through the exchanges.

Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Section 402 of the FDA Food Safety Modernization Act (FSMA)

Under 21 U.S.C. §399d(a), an employee (or person acting at the request of an employee) is protected from discrimination because she:

- Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of the FD&C or any rule or regulation under the FD&C
- Testified or is about to testify in a proceeding concerning a violation

Whistleblower Directors Speak: OSHA Whistleblower Protection Program

Section 402 of the FDA Food Safety Modernization Act

- Assisted or participated or is about to assist or participate in a proceeding concerning a violation
- Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other person acting at the request of the employee) reasonably believed to be in violation of any provision of the FD&C or any rule or regulation under the FD&C