

JUNE 27, 2011

VOL. XVIII, NO. 25



## COMPLIANCE CLARIFIED

### Coping With The New Whistleblower Rules

The Securities and Exchange Commission's recently adopted whistleblower rules have major implications for compliance officers. The Dodd-Frank Act includes a provision that incentivizes whistleblowers by providing a bounty of 10-30% of any monetary sanctions over \$1 million recovered by the government. Compliance professionals will need to deal with these new rules and the potential increased stream of whistleblower tips that they may create. A robust compliance program will include four key elements, as described below.

#### 1) A culture of compliance

A culture of compliance is key to preventing wrongdoing and to encouraging employees to report possible violations internally. Corporate culture is set from the top of the organization, and senior management and the boards of directors can demonstrate a commitment to compliance. Companies should check their codes of conduct to see if any changes may be needed and disseminate these codes to all employees. Employees should receive training on the code when they are hired, and periodically thereafter.

Companies might consider requiring employees to sign an annual certification stating that they have read the code of conduct and received training. This signals the company's commitment to compliance and impresses upon employees their part in ensuring compliance policies are followed. Companies may also require employees to report possible violations and certify annually that they have reported potential violations of law or company policies.

Communication is central. An emphasis on the importance of compliance and internal reporting can show the company's commitment. Companies can raise employee awareness through various means, including employee newsletters and electronic communications, recognition of individuals who

identify control or compliance needs and using commitment to compliance as a factor in personnel evaluations.

#### 2) Review internal reporting procedures

The new rules provide incentives for employees to use internal reporting systems before going to the SEC, but employees are still permitted to bypass internal systems and go straight to the Commission. Therefore, companies should consider measures to promote internal reporting. Make internal reporting easy and accessible. A successful system might include a toll-free hotline, an ombudsman, use of anonymous e-mail complaints and online forms. Reporting mechanisms should be available 24/7 and in multiple languages.

#### 3) Reinforce human resource procedures

Human resources will play an important role in promoting the use of internal compliance programs and responding to whistleblower complaints. HR personnel can help assure protection of whistleblowers by ensuring employment decisions are made without regard to protected activity, thereby avoiding the liabilities Dodd-Frank creates for alleged retaliation. They can also address employees' personnel concerns before they spill over into whistleblowing activity.

In addition, HR can also aid company compliance efforts by: screening and vetting potential employees; responding promptly to troubled working relationships; using compliance factors in employee evaluations; reviewing existing whistleblower protections and helping managers understand the company's anti-retaliation policies; and training managers to be receptive to employee concerns and to take proper steps to address them. Many employees will first approach a direct supervisor about potential misconduct. If these supervisors do not take these reports seriously, employees are less likely to use other internal compliance procedures.

#### 4) Establish internal investigation policies and practices

Companies should consider developing a system to respond quickly to allegations of impropriety. Companies that have systems already should review their procedures and make any necessary changes.

In light of the new whistleblower rules, companies

conducting an investigation should consider having an investigative plan ready to: respond to different types of allegations geared to the nature of the claim, its materiality and the personnel involved; determine who within the organization is responsible for the matter; and establish lines of reporting within management and to the board. Due to the potential exclusions and exceptions to exclusions for whistleblowing by legal, compliance and internal audit personnel, companies may

wish to apprise whistleblowers and others involved in the investigation of the complaint of the status of investigations so that whistleblowers (and others in audit or compliance functions) know that their concerns are being addressed.

---

*John Sturc is a partner and Molly Clafin an associate in the Washington, D.C., office of Gibson Dunn & Crutcher. Joshua Dick is an associate in the firm's Palo Alto, Calif., office.*