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SCCE and HCCA
interview their 10,000th
member: Vernita Haynes,
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Analyst for the University
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by Ryan McConnell, Jay Martin, and Katharine Southard

Three steps to Dodd-Frank whistleblower readiness

- » One: Have a strong code of conduct that requires employees to report misconduct and prohibits retaliation
- » Two: Foster a culture of open communication and train managers to deal with concerns raised by employees
- » Three: Have an internal investigation plan that can quickly, confidentially, and credibly respond to compliance concerns

In August 2011, the whistleblower protection rule in the Dodd-Frank Act became final. The new rule provides that individuals who voluntarily provide original information to the Securities and Exchange Commission (SEC) about possible US securities violations that result in a successful enforcement action aggregating over \$1 million in penalties may collect an award of 10% to 30% of the amount recovered.



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The whistleblower rule prohibits companies from retaliating against so-called whistleblowers who possess a reasonable belief that the information relates to a past, present, or future securities law violation. Companies are also prohibited from interfering with a whistleblower's efforts to communicate with the SEC. Certain individuals typically cannot collect the award unless the company's conduct will cause substantial financial injury or the company is obstructing the investigation or has already had the information for at least 120 days. This group includes compliance personnel, company officers, and directors who obtain the information through the company's reporting chain; outside lawyers and



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accountants, in most circumstances; and foreign government officials.

The SEC received a flood of comments urging that the rule require whistleblowers to first use the company's internal reporting system before going to the SEC. Commentators suggested such a requirement was consistent with the United States Sentencing Commissions' (USSC) instructions to companies to develop robust compliance programs. The SEC rejected this request and decided that whistleblowers could either report directly to the SEC or report to the SEC within 120 days after reporting the information to the company. Whistleblowers who first report to the company obtain the benefit of any information subsequently developed by the company during an internal investigation and later reported to the SEC. A whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award. A whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.

Corporations are sorting out the impact of the Dodd-Frank whistleblower rule on corporate compliance programs. Every company will have to make some adjustments. We have put together three steps for a successful post-Dodd-Frank compliance program.

Step 1: Have a strong code of conduct that prohibits retaliation and follow it

Codes of conduct are not one-size-fits-all. And they are not all created equal. They run the gamut from an easy-to-read set of rules with clear examples of a company's expectations, to 60-page tomes that take several sittings to digest. Regardless of length, every company's code of conduct must clearly state that employees have the obligation to promptly report all actual or potential misconduct to the company and prohibit retaliation for good-faith reporting. The USSC has long mandated that companies "have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."

Many Fortune 500 companies fail to clear this basic Dodd-Frank hurdle, including 16% of oil and gas companies, 27% of technology companies, 9% of chemical companies, and 10% of financial institutions. At a minimum, language in a company's code of conduct should tell employees (1) retaliation for good-faith reporting will result in discipline for those who retaliate, and (2) what to do if whistleblowers believe they experience retaliation. Without this basic Dodd-Frank protection, employees may feel uncomfortable using the compliance program to address compliance concerns.

In addition to a strong anti-retaliation policy, companies should implement procedures to ensure that employees who raise compliance concerns are treated fairly by the company. For example, any performance management or disciplinary action against such an employee should be reviewed first by the company to ensure that the action is taken for non-retaliatory reasons and that

other similarly situated employees are being treated in a similar fashion. Companies should adequately document actions that involve employees who raise compliance concerns to highlight the lawful reasons for any adverse employment actions.

Finally, companies must avoid the whistleblower trap by taking steps to ensure that a former employee does not later claim to have

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been a whistleblower wrongfully terminated by the company. Companies should consider measures such as mandating that the exit interview process for departing employees (1) documents the employee's reasons for departure and (2) includes confirmation from the departing employee that he or she is unaware of any violations of the company's code of conduct.

Step 2: Foster a company culture of open communication

Open communication is critical to an effective compliance program. Employees will not bring problems to the attention of the company before going to the SEC unless they trust the compliance program. Open communication begins with ensuring managers and supervisors understand the importance of communication and the reporting

procedures. Companies must ensure that all employees have an easy path to confidentially report compliance issues internally in their native language consistent with the Federal Sentencing Guidelines (FSG). Employees feel more comfortable reporting issues to managers who understand and value compliance. After the employee reports the concern—either through a hotline or by contacting a manager—companies must keep the employee apprised of the status of the investigation. If an employee is left in the dark after internally reporting a concern, the risk of reporting to someone outside of the company increases.

Step 3: Have an internal investigation plan that can quickly and credibly respond to compliance concerns

Companies must have an internal investigation plan to ensure that they can respond effectively to employee internal reports within 120 days—the Dodd-Frank window for employees to report to the SEC after supplying information internally. The investigation plan should determine which employees and departments will be involved in different types of investigations and develop basic protocols used in whistleblower investigations. The company should also identify in advance

the various types of allegations that will require the use of outside counsel to investigate to expedite the start of the investigation. Companies should ensure that relevant documents are preserved and retrieved quickly, that appropriate personnel are contacted and interviewed in a timely fashion, and that attorney-client privilege is preserved during interviews.

To protect against inadvertent disclosures, companies should apply the same hotline confidentiality principles to internal investigations. During investigations, counsel should advise employees who are interviewed that they cannot reveal the existence of the investigation or the substance of the interview to anyone and counsel must keep the identity of the employee who raised the compliance concern confidential. Confidentiality will reduce the potential for retaliation when employees make non-anonymous complaints. It will also help to insulate managers from allegations that their regular supervisory activity was motivated by retaliatory reasons. *

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