ALL WHISTLEBLOWERS!

This edition departs from our usual quarterly Newsletter format in that it deals exclusively with recent developments regarding whistleblowers, both in the U.S. and abroad:

- The latest update from the U.S. Securities and Exchange Commission (SEC) on its implementation of whistleblower incentives
- The evolving question as to the extraterritorial reach of whistleblower protections
- Whistleblower safeguards around the world

WHISTLEBLOWER: A person (usually an insider at an organization, but potentially a client, customer, business partner or other) who raises a concern about wrongdoing occurring at the organization. Whistleblowers may make their allegations externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues) or internally (to other people within the accused organization). Until recently, if such activities were legally protected, this was done largely under state law. With SOX and Dodd-Frank, both federal laws, this has changed for employees of public companies. The reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.

The Willis Directors & Officers Liability Insurance Dictionary

BOUNTY HUNTER REPORT

Neither rain nor sleet, nor the federal government shutdown stopped the SEC from meeting its annual duty of publishing a report of activities under its Dodd-Frank whistleblower program. The bounty program was designed to financially incentivize individuals who provide the SEC with original information about securities law violations at public companies that lead to successful enforcement actions (“success” is defined as resulting in recoveries exceeding $1,000,000). The financial incentive, or “bounty,” ranges from 10-30% of the sums collected by the Commission or in a related agency action.

The number of whistleblower tips received increased 8%, from 3,001 in fiscal year 2012 to 3,238 in the FY 2013. This brings the program to a grand total of 6,573 tips received since its creation in August 2011.
Looking at year-over-year data, the number of tips in all categories increased in FY 2013, other than for Municipal Securities and Public Pensions, where there was a 25% decrease. The categories with the highest rate of increase were Offering Fraud and Manipulation, which rose by 19% and 15%, respectively. With initial public offerings (IPOs) on the increase and the JOBS Act just taking effect, this could be a cause for concern.

**TIPS BY ALLEGATION**

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other and Blank</td>
<td>17.20%</td>
</tr>
<tr>
<td>Corporate Disclosures and Financials</td>
<td>16.20%</td>
</tr>
<tr>
<td>Offering Fraud</td>
<td>15.0%</td>
</tr>
<tr>
<td>Manipulation</td>
<td>6.0%</td>
</tr>
<tr>
<td>Insider Trading</td>
<td>5.20%</td>
</tr>
<tr>
<td>Trading &amp; Pricing</td>
<td>4.60%</td>
</tr>
<tr>
<td>Unregistered Offering</td>
<td>3.20%</td>
</tr>
<tr>
<td>Market Event</td>
<td>2.70%</td>
</tr>
<tr>
<td>FCPA</td>
<td>2.00%</td>
</tr>
<tr>
<td>Municipal Securities and Public Pensions</td>
<td>1.50%</td>
</tr>
<tr>
<td>Other and Blank</td>
<td>1.50%</td>
</tr>
</tbody>
</table>

Similar to the previous year, in 2013 whistleblower tips were submitted from all 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands. Tips also came in from 55 foreign countries – for a total of 404 or roughly 12.5% of all tips for this period.

**NAMES MAY BE CHANGED TO PROTECT THE INNOCENT (AT LEAST, AT HOME)**

In addition to its whistleblower bounties, Dodd-Frank extended additional anti-retaliation protections to SEC tipsters. Viewed as critical to the success of the whistleblower program, these provisions prohibit any person from preventing a whistleblower from reporting a securities violation to the SEC or for retaliating against such an individual after the fact.

An unsettled issue is whether these whistleblower protections apply to those reporting wrongdoing from outside of the U.S. (the 12.5% of total tips referenced above). A recent New York federal district judge said “no” and decided against the extraterritorial application of Dodd-Frank’s whistleblower protections. The case involved a whistleblower retaliation claim filed by a former compliance officer who alleged that he was fired one week after attempting to blow the whistle internally about possible FCPA violations. The tipster had also reported these perceived matters to the SEC. So, apparently, while foreign tipsters may receive whistleblower bounties, they may not receive protection against retaliation for their “fruitful” tipping. Further legal action will likely be required for certainty on this issue (as the decisions so far have all been at the lower [district] court level).

The Office of the Whistleblower at the SEC actively coordinates with its Enforcement Division staff to identify situations where employers may have taken retaliatory actions against individuals who reported potential securities law violations. These include those who have developed confidentiality, severance or similar agreements that may serve to discourage or prohibit employees from speaking out about potential wrongdoing. Under the SEC’s whistleblower program, individuals can submit claims anonymously, further protecting them from retaliation. In fact, to date, the SEC has withheld whistleblower names in each of the four awards it’s handed out.
WHISTLEBLOWING, ON THE GLOBAL SCENE

While whistleblowing is becoming something of a global phenomenon, protections against retaliation haven’t always caught up. Without sufficient legal protections, employees may be fired, demoted or harassed for exposing corruption and wrongdoing. This can have a chilling impact on those detecting and reporting misconduct.

COUNTRIES THAT OFFER PROTECTION FOR WHISTLEBLOWERS (2000 AND 2009)\(^6\)

<table>
<thead>
<tr>
<th>PROTECTION FOR WHISTLE-BLOWERS</th>
<th>0%</th>
<th>20%</th>
<th>40%</th>
<th>60%</th>
<th>80%</th>
<th>100%</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LEGAL</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>ANONYMITY</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>OTHER</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**PERCENTAGE OF THE 29 OECD COUNTRIES THAT RESPONDED TO THE 2000 AND 2009 SURVEYS**

- **2000**
- **2009**

The global framework to provide protections may exist (see graph above and text box below), but not all jurisdictions are actively enforcing existing anti-retaliation provisions.

---

**G20 Anti-Corruption Action Plan Protection of Whistleblowers:** At the 2011 G20 Summit, leaders of the largest nations endorsed the Monitoring Report of the G20 Anticorruption Working Group. The report includes a compendium of best practices and guiding principles intended to assist in enacting and reviewing, when necessary, whistleblower protection rules by the end of 2012.\(^7\)

**Whistleblowers’ protection under United Nations Convention against Corruption (UNCAC):** Signed in December of 2005 the Convention has 140 signatories and among them, 93 states have ratified the provisions. Article 33 of the Convention provides for the protection of whistleblowers by calling on each State Party to consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment of whistleblowers who report in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.\(^8\)

**Whistleblowers’ protection under OECD Convention on Bribery of Foreign Public Officials in International Business Transactions (OECD Convention):** Adopted in November of 1997 and ratified by 37 nations, whistleblower regulations are a core part of the Convention where countries are mandated to establish complaint procedures and to protect whistleblowers in the public and private sector.\(^9\)
THE EU

In an assessment of the adequacy of whistleblower protection laws of 27 countries of the European Union (EU), a recent Transparency International Report found only four to have legal frameworks for advanced whistleblower protections: Luxembourg, Romania, Slovenia and the United Kingdom; 16 have partial legal protections for employees who come forward to report wrongdoing; and seven have either very limited or no legal frameworks.10

In October of this year, the European Parliament called on the European Commission to submit a legislative proposal establishing an effective and comprehensive European whistleblower protection program in the public and in the private sector by the end of 2013. The stated aim is to protect those who detect irregularities and report cases of national and cross-border corruption relating to EU financial interests and to protect witnesses, informers and those who cooperate with the courts. They also called on the Member States to develop their own local appropriate and effective protection for whistleblowers.11 The Commission has indicated that it will not act on this issue at the present time.12

INDIA

The Indian government has been considering a whistleblower protection law for several years. In 2003, the Law Commission of India recommended the adoption of the Public Interest Disclosure (Protection of Informers) Act, 2002.13 More recently, the Public Interest Disclosure and Protection of Persons Making the Disclosures Bill, 2010 was introduced into the lower house of the Parliament of India. The cabinet approved the bill in June 2011 and renamed it The Whistleblowers’ Protection Bill, 2011. Although passed by the lower house in December of 2011, the bill is still pending in the upper house of Parliament.

REST OF WORLD

New Zealand14 and South Africa,15 as well as a number of other countries (including Ghana,16 South Korea17 and Uganda18) have comprehensive whistleblower laws. Such laws are also under consideration in a significant number of additional jurisdictions.

CONCLUSION

On the global scene, both whistleblowers and global organizations continue their focus on the Dodd-Frank whistleblower bounty program in the U.S. as well as the potential extraterritorial reach of its whistleblower protections, which has not yet been fully decided. Outside the U.S., whistleblowing is becoming become part of local culture, which means that legal protections against whistleblower retaliation are on the horizon — often starting in the public sector but likely expanding to encompass private companies. In jurisdictions where the legislation is in place, enforcement is the next step.

In the interim, where legislatures have not yet acted, the courts may fashion remedies of their own.

This is a definitely an issue that warrants continued attention.
FINEX Alerts and Newsletters provide a general overview and discussion on a wide range of topics. They are not intended, and should not be used, as a substitute for legal advice in any specific situation.

For related reading, you may be interested in:

WillisWire: “Reports of Fraud Increase, Whistleblowing Study Finds,” August 2013
WillisWire: “The SEC's 2nd Whistleblower Bounty Comes from a Surprising Source,” June 2013
WillisWire: “Who You Whistling At? Internal Whistleblowing Also Protected - Just not Under Dodd-Frank,” May 2013
WillisWire: “U.S. Whistleblower Protections: Global or Not?” July 2012
FINEX Alert: “Do Whistleblower Protections Cover Leaks to the Media?” June 2011

1 The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173) is commonly referred to as Dodd-Frank and was signed into federal law July 21, 2010. Section 922 of Dodd-Frank is entitled Whistleblower Protection and in subsection (a) it modifies the Securities Exchange Act of 1934 by adding: “SEC. 21F. Securities Whistleblower Incentives and Protection.”


3 Passed on April 5, 2012, the Jumpstart Our Business Startups Act (JOBS Act) is aimed at encouraging the funding of small businesses in the U.S. by easing various securities regulations.


6 Whistleblower protection: encouraging reporting, July 2012, page 6, figure 1, OECD. www.oecd.org/general/48972967.pdf

7 Ibid

8 http://www.whistleblower.org/component/content/article/358

9 http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/oecd_convention


15 http://www.nacf.org.za/guide_to_the_whistle_blowing_act/section_two.html


17 In 2011, Korea implemented the “Act on the Protection of the Public Interest Whistleblowers” to protect whistleblowers who report any violation of the public interest in both public and private sectors.

18 The Whistleblowers Protection Act of 2010 was a landmark piece of legislation in Uganda, requiring the government to protect the identity of whistleblowers and pay them a reward of 5% of any funds recovered as a result of information provided by the whistleblower.