

The Impact of the New Dodd-Frank Rules – Whistleblowing and Corporate Compliance

June 15, 2011

Prepared by:

Kathryn Cameron Atkinson, Member, Miller & Chevalier

Andrew Wise, Member, Miller & Chevalier

Guest speaker:

Sean McKessy, Chief, Office of the Whistleblower, United States Securities and Exchange Commission

MILLER
CHEVALIER

Discern the Difference™



MAIN JUSTICE
POLITICS, POLICY AND THE LAW

© Miller & Chevalier Chartered

Moderator

Mary Jacoby

Mary Jacoby is an award-winning former reporter for the Wall Street Journal, Salon magazine, the St. Petersburg Times of Florida, the Chicago Tribune and Roll Call.

From 2005 – 2007 she reported from Brussels for the Wall Street Journal, where she covered European Union antitrust and regulatory issues, breaking numerous stories about investigations involving Intel, Microsoft Corp., MasterCard and other major companies.

Her investigations have ranged from the influence of Russian oligarchs in Washington to terrorist financing and white-collar crime.



Presenter

Kathryn Cameron Atkinson

Kathryn Cameron Atkinson's practice focuses on international corporate compliance, including, in particular, the Foreign Corrupt Practices Act (FCPA), as well as export controls and economic sanctions, and anti-money laundering laws. She is currently serving as a government-appointed Independent Compliance Monitor in an FCPA matter settled with the DOJ and SEC. She was a member of the original Transparency International task force that developed a compliance toolkit for small and medium-sized entities.



On the compliance side of the practice, Ms. Atkinson focuses in particular on the design and implementation of custom-tailored international regulatory compliance programs for large and small companies in a wide range of industries.

Ms. Atkinson's recent accomplishments include creating and chairing an annual International Corporate Compliance Conference, sponsored by the Institute for International and Comparative Law (IICL) of the Center for American and International Law (CAIL).

Presenter

Andrew Wise

Andrew Wise defends individuals and companies in white-collar criminal trials in federal and state courts and represents clients in connection with criminal, regulatory and administrative investigations. He has defended clients in complex cases involving allegations of accounting, tax and securities fraud and tried numerous cases involving government investigation-related charges such as perjury, false statements and obstruction of justice.

Mr. Wise has also conducted internal investigations for numerous companies and organizations regarding potential violations of the FCPA, the Internal Revenue Code and other federal and state laws and regulations. He has extensive experience with issues that arise in the context of such investigations and in solving the challenges that arise when a party faces simultaneous criminal investigation and civil proceedings.



Guest Speaker

Sean McKessy

Sean McKessy oversees the new Whistleblower Office in the Division of Enforcement at the Securities and Exchange Commission. He is charged with working with whistleblowers, handling their tips and complaints, and helping the Commission determine the awards for individuals who provide the agency with information that leads to successful enforcement actions.

Mr. McKessy was previously at the SEC, where he was a Senior Counsel in the Division of Enforcement from 1997 to 2000. More recently, he served as corporate secretary for both Altria Group, Inc. and AOL Inc., and as securities counsel for Caterpillar, Inc. In these roles, he developed and supervised internal compliance and reporting programs related to the federal securities laws, served as corporate compliance officer, and coordinated the reporting of potential violations to boards of directors.



What is the Dodd-Frank Whistleblower Program?

- Basic Requirements
- Legislative History
- Rulemaking Process
- Establishment of the Whistleblower Office

The Final Rules

- Introduction to the Rules specifically lists some of the changes, and Chairman Schapiro mentioned others in her speech announcing the Rules
 - Aggregation of smaller actions to meet the \$1 million threshold
 - Expanded eligibility of internal compliance personnel, counsel, and auditors to qualify as whistleblowers
 - Strengthened anti-retaliation provisions
 - Streamlined reporting procedures
 - Increased incentives to utilize internal compliance reporting processes
 - Increased focus on the quality of a whistleblower's information and assistance and on issues of whistleblower culpability

Basics: “Original Information” and “Voluntary Submission”

- Definition of “original information”
 - What is independent knowledge?
 - What is independent analysis?
- Definition of “voluntary submission”
 - What is included in the definition of “governmental agency or self-regulating board”
 - What about non-compelled responses?

Issue: Aggregation of Smaller Actions to Meet the \$1 Million Threshold

- The \$1 million threshold
- What does the final rule say about aggregation?
 - Change from the proposed rule
- What was the reason for the change?
- What factors will the SEC consider in answering “same nucleus” question
- Can DOJ, state AG recoveries factor into the \$1 million threshold?

Issue: Legal and Compliance Professionals as Whistleblowers

- General rule
- Exceptions to that general rule
 - When attorney-client communications can qualify as “original information”
 - ❖ Purpose of that exception
 - ❖ Concerns and considerations
 - When legal, compliance, and audit personnel can qualify as whistleblowers
 - ❖ Purpose of that exception
 - ❖ Concerns and considerations

Issue: Strengthened Anti-Retaliation Provisions

- Final Rules
 - Language
 - “Possible” vs. “potential” (proposed rules) vs. “probable” or “likely” (suggestion of many commenters)
 - ❖ Reasons for adoption of the term “possible”
 - Does this provision properly protect against frivolous claims?
- SEC enforcement authority over a company that violates the anti-retaliation provisions
- Compliance measures to consider in accordance with the new anti-retaliation provisions?

Issue: Increased Incentives to Utilize Internal Compliance Processes

- Should an individual be required to report through internal compliance procedures as a prerequisite to eligibility for an award?
 - Arguments of the commenters in favor of such a requirement
 - Why the SEC decided against such a requirement
- Incentives in the rules to use a company's internal compliance procedures
- The 120-day “lookback” period
 - Is 120 days enough for a company to make a meaningful determination of the validity of a whistleblower's report?
- What compliance program changes should companies consider in light of a potentially condensed time period for investigation and review

Issue: Increased Focus On Quality of a Whistleblower's Information, Assistance, and Culpability

- Should individuals who were culpable in the conduct they reported be eligible to qualify as whistleblowers?
- Final Rules:
 - Clarification regarding amnesty
 - ❖ Any intersection between the Whistleblower Program and the SEC's relatively-new Cooperation Program?
 - Effect of a criminal conviction
 - ❖ Why no bar on recovery by a whistleblower found civilly-liable?
 - Exclusion of amounts from sum on which the award is paid
- Does the program properly prevent the rewarding of culpable actors?

Q&A

For additional information contact:

Kathryn Cameron Atkinson

katkinson@milchev.com

202-626-5957

Andrew Wise

awise@milchev.com

202-626-5818

Materials

Download today's presentation at

<http://www.mainjustice.com/webinars>

or

<http://www.mainjustice.com/2011/06/14/dodd-frank-rules-webinar/>