

## SEC Releases Whistleblower Program's 2012 Annual Report

On November 15, 2012, the Securities and Exchange Commission ("SEC" or the "Commission") released its *Annual Report on the Dodd-Frank Whistleblower Program* (the "Report"). The Report – which was prepared by the Commission's Office of the Whistleblower ("OWB" or the "Office") to satisfy its annual reporting obligations under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and the Securities Exchange Act of 1934 – summarizes OWB's activities during fiscal year 2012 and demonstrates an increase in enforcement activity.

The Office received 3,050 hotline phone calls from members of the public in fiscal year 2012, a sharp increase over the 650 phone calls received during the five months of the hotline's operation in 2011. OWB received 3,001 formal whistleblower tips via submission of Form-TCR by mail, fax and online. (While the actual number of tips exceeds 3,001, the Report excludes tips received from those who neglected to submit the requisite paperwork or are otherwise ineligible to receive awards.) The tips most frequently concerned Corporate Disclosures and Financials (547 tips, 18.2%), Offering Fraud (465 tips, 15.5%) and Manipulation (457 tips, 15.2%). While the 115 complaints related to the Foreign Corrupt Practices Act amount to only 3.8% of the year's total, that share may rise in the future, along with the increasing focus on anti-corruption enforcement.

The diversity of whistleblowers is also noteworthy. Any concerns about the Commission's ability adequately to publicize its whistleblower program have seemingly been laid to rest by OWB's receipt of tips from individuals in all 50 states and the District of Columbia, as well as Puerto Rico. The largest number of tips emanated from California (435 tips, 17.4%), New York (246 tips, 9.8%) and Florida (202 tips, 8.1%). The number of tips originating abroad during the 2012 fiscal year was 324, or 10.8% of the total. The Office received tips from whistleblowers in 49 countries outside the United States; 74 tips originated in the United Kingdom, 46 tips originated in Canada, 33 tips originated in India and 27 tips originated in China.

With a clear increase in tipsters reporting directly to the SEC, the Commission has increased the staff of the Office of the Whistleblower. The Office is led by Chief Sean X. McKessy and Deputy Chief Jane A. Norberg, who are assisted by eight attorneys and support staff. We expect that the Office will grow in fiscal year 2013.

Under Section 922 of the Dodd-Frank Act, the SEC must make monetary awards to qualifying individuals who provide information that leads to successful enforcement actions resulting in a recovery of more than \$1 million. Whistleblowers receive bounties of 10% to 30% of the monetary sanctions collected. OWB posts a Notice of Covered Action for each SEC enforcement action in which a final judgment or order results in monetary sanctions exceeding \$1 million. The Commission posted 143 Notices of Covered Action during the 2012 fiscal year. By posting a Notice, the SEC does not make any determination that a whistleblower tip led to an investigation or that a tipster will receive an award. The onus is on the whistleblower to apply for an award by completing and submitting to the Office Form WB-APP within 90 calendar days of the posting. Applications are reviewed by the Claims Review Staff.

To date, the SEC has issued only one award under the whistleblower program – an August 21, 2012 award of \$50,000 to an anonymous tipster who helped uncover a multi-million dollar fraud. (The tipster was recently awarded another \$500, and is eligible to collect additional award funds as additional sanctions are collected.) But OWB staff members are actively reviewing additional tips and applications for awards, and the Office has the financial wherewithal to grant significant bounties soon. Indeed, whistleblower program awards are

paid from the SEC's Investor Protection Fund, which currently maintains a balance of over \$450 million. And the quality of tips submitted by whistleblowers vying for a piece of the awards pie is expected to rise as sophisticated counsel – many of whom have significant experience assisting whistleblowers in connection with the False Claims Act, upon which the Commission has modeled its own program – recruit and vet tipsters and help craft impressive whistleblower submissions.

Commenting on the 2012 Report, SEC Chairman Mary L. Schapiro said, “In just its first year, the whistleblower program already has proven to be a valuable tool in helping us ferret out financial fraud.” Given the significant resources devoted to establishing the whistleblower program and the volume of tips generated to date, we anticipate that the 2013 financial year will bring an increase in the Office's activities as well as the number and value of bounties OWB awards to qualifying whistleblowers.

We will continue to evaluate the actions of the SEC's Office of the Whistleblower and their impact on your business activities. If you have any questions concerning the 2012 Report, the SEC's whistleblower program or any other securities enforcement issue, please contact the Ropes & Gray attorney with whom you regularly work.