Questions To Ask When Faced With A Whistleblower Complaint

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Christian R. Bartholomew

Partner, Jenner & Block, LLP
Washington, D.C. Office

Christian R. Bartholomew is a member of the firm’s Securities Litigation and Enforcement Practice. As a former undefeated trial lawyer for the Securities and Exchange Commission (SEC) with more than two decades of public sector and private practice experience, Mr. Bartholomew has successfully resolved regulatory and internal investigations and litigation matters on behalf of well-known financial institutions and public companies on virtually every securities-related issue confronting these clients. Recognized by Chambers USA as a leader in the area of the SEC’s whistleblower rules, Mr. Bartholomew has represented a number of prominent financial institutions and public companies in internal and regulatory investigations regarding sensitive whistleblower allegations. He has also advised companies on strengthening their internal protocols to incentivize internal reporting, and has written and spoken extensively on these issues.
Whistleblower Complaints: How to Respond

• Company receives whistleblower complaint – what next?
• Response will vary widely depending on the situation and issues involved.
  – Questions/Issues to Consider:
    • Has whistleblower complained to SEC? When?
    • Did the whistleblower first report internally?
    • Do you know who the whistleblower is? Do you want to know?
    • Is whistleblower represented by counsel?
    • Is whistleblower a company employee or third party? Is whistleblower still employed?
    • Who is involved? Is senior management implicated?
    • What is the nature of the misconduct?
    • Is the whistleblower involved in the misconduct?
    • How widespread and severe is the misconduct? Is there harm to customers and/or shareholders?

• Get as much information as possible and be sure to document all information learned and steps taken
Whistleblower Complaints: How to Respond (cont’d)

• Consider who needs to be informed about complaint
  – Should general counsel be informed? When should the audit committee be involved? When should the board be involved?

• Determine scope of internal investigation
  – Is this an isolated problem or is it widespread? What is length of time period involved? Is senior management involved?

• Is this a matter for internal or external counsel?
  – Will depend on the nature of the conduct and individuals involved

• Do remedial measures need to be taken?

• Does the company need to disclose the complaint/alleged wrongdoing?
Whistleblower Complaints: Potential Issues

• Potential issues the company might encounter:
  – What if the whistleblower is culpable?
    • What was whistleblower’s role in the conduct? Is it ongoing?
    • What actions should the company take to protect itself?
    • What steps need to be taken to ensure that the company does not run afoul of the anti-retaliation provisions?
    • Especially important that any disciplinary action be narrowly tailored to the misconduct and NOT generalized punishment, which can be interpreted as retaliation.
  – How should the company handle communications with the whistleblower? should the whistleblower be informed of developments/conclusions?
  – What if the whistleblower is represented by counsel?
  – How do you handle an internal investigation if the whistleblower refuses to cooperate?
  – What if the whistleblower is not an employee but a third-party?
  – How does the company determine which complaints have merit?
Whistleblower Complaints: Reporting Scenarios

• Possible reporting scenarios will impact the company’s response
  – Whistleblower complains to company first (internal report)
  – Whistleblower complains to company and SEC simultaneously
  – Whistleblower complains only to SEC
Reporting Scenarios: Internal Report and 120-Day Clock

• If whistleblower reports internally before reporting to the SEC, whistleblower will want to report to the SEC within 120-day “look-back” period
  – What does this mean for the company?
  – Should company report to the SEC within 120-day period?
  – Under what circumstances will company want to report before expiration of 120-day period?
  – Does investigation need to be complete when company reports?
  – Under what circumstances would company not want to report at all?
    • What if the complaint has no merit? Or does not involve securities violations?
Reporting Scenarios: Internal Report and 120-Day Clock (cont’d)

- 120-day clock increases pressure to investigate quickly and may change and complicate calculus for deciding whether and when to report to the SEC
- Most often will want to report within 120-days where complaint has merit and certain or near-certain that whistleblower will go to SEC
- Better for SEC to learn of conduct from company than from whistleblower
  - Permits company to control and define the issues, rather than playing “catch up” if whistleblower gets to SEC first
- Company may be eligible for self-reporting credit under SEC’s cooperation guidelines

• But investigation does not need to be complete at the time of reporting
Reporting Scenarios: Internal Report and 120-Day Clock (cont’d)

– May even want to consider reporting before 120-day ends depending on:
  – Gravity and materiality of allegations
  – Whether senior management and/or board members are subjects of the allegations
  – Degree to which initial findings are problematic
Reporting Scenarios: Whistleblower Goes Directly To SEC

• What can the company do if the whistleblower goes directly to the SEC?

• Will the SEC permit the company to conduct an internal investigation and report back?
  – SEC says it will consider nature of alleged conduct, level at which conduct occurred, and company’s existing culture related to corporate governance
  – SEC has also said that it will also consider “what role, if any, internal compliance had in bringing the information to management’s or the Commission’s attention”

• What can be done to encourage whistleblowers to report internally before going to the SEC?