

Alerts

SEC Whistleblower Rule Excludes Money Awards to Attorneys and Others Violating Attorney-Client Privilege and Confidentiality

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Lawyers for the Profession® Alert

Securities and Exchange Commission's Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934.

Brief Summary

The Securities Exchange Commission (SEC) issued a final rule that provides for money to be awarded to whistleblowers who come forward with new information on violations of the Securities Exchange Act of 1934 (SEA) that leads to a sanction exceeding \$1 million. The rule specifically excludes information protected by the attorney-client privilege and information obtained as a result of legal representation, unless the disclosure of that information is otherwise permitted by law, including by other SEC rules and state law and ethics rules.

Complete Summary

The SEC issued a final rule, Rule 21F, applying whistleblower provisions in the Dodd-Frank Act Wall Street Reform and Consumer Protection Act. Rule 21F-3 authorizes the SEC to award money to people who voluntarily come forward to report original information that demonstrates SEA violations and leads to at least \$1 million in sanctions. New Rule 21F-4(b)(2) requires that the information reported come from "independent knowledge," which is defined as information not available from public sources, and be based on personal experience, observation or communications.

Rule 21F-4(b)(4)(i) specifically excludes attorneys from the monetary award when the lawyer gains information that either is protected by attorney-client privilege or is obtained as a result of the legal representation of a client, by excluding such information from the definitions of "independent knowledge" and "independent analysis." These exclusions apply to all lawyers, whether retained or in-house counsel. The rule clarifies that this exclusion also applies to nonattorneys who gain otherwise privileged or protected information through a lawyer. An attorney may qualify for the award if he or she gives information that is not subject to the attorney-client privilege or that is not obtained as a result of the representation.

Importantly, the exclusions also do not apply where a lawyer is permitted to disclose information that is otherwise privileged or obtained as a result of the

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representation. Those circumstances include when the client waives privilege, the SEC rules permit disclosure, or state law or bar ethics rules allow the attorney to divulge the information. Thus, disclosures permitted or required by the SEC rule (17 C.F.R. 205.3(d)(2)) (permitting lawyers to reveal confidential information under specified circumstances to prevent or rectify SEA violations) or by American Bar Association (ABA) Model Rules 1.6(b) (the crime/fraud exception) and 1.13 (c) (up-the-ladder reporting) are not excluded by the new rule from receiving a whistleblower award.

Significance of the Rule

SEC Rule 21F by its terms will not reward a lawyer for bringing original information to light regarding SEA violations if that information arises from attorney-client privilege or client representation, regardless of whether the information arises from an in-house or retained relationship. However, the lawyer may receive such an award if the client waived privilege, other SEC rules allow, or state law or ethics rules authorize the disclosure. As a practical matter, those exceptions permitting an award appear to be broad enough to cover many instances in which attorneys may report information to the SEC.

For more information, please contact your regular [Hinshaw](#) attorney.

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