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## Regulatory: Dodd-Frank whistleblower awards and attorney–client privilege

Privileged information isn't eligible for whistleblower rewards, but does its disclosure to the SEC count as a privilege waiver?

BY EDWARD HORTON  
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Enacted pursuant to Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Rule 21F of the Securities Exchange Act of 1934, as amended, provides for monetary awards and protection from retaliation for corporate whistleblowers, among other things. Awards under the rule are limited to information relating to violations of federal securities laws leading to a successful Securities and Exchange Commission (SEC) enforcement action resulting in monetary sanctions exceeding \$1 million. While the granting of awards under the rule is contingent on the satisfaction of multiple procedural and substantive requirements, the rule creates an unavoidable incentive for the disclosure of sensitive information about subject companies, including information that may be subject to attorney-client privilege, which, under certain circumstances, may be deemed a waiver of such privilege.

In adopting Rule 21F, the SEC implicitly recognized this incentive, and expressly excluded tips based on information obtained through attorney-client privileged communications or in the course of the legal representation of others from eligibility for awards. Such exclusion is not applicable, however, where the disclosure of the information was otherwise permitted, such as instances where the privilege had been waived, or where disclosure was permitted under applicable ethical standards or SEC rules or regulations (for example, Sarbanes-Oxley provisions permitting disclosure to the SEC under certain circumstances). It should also be noted that while the rule protects certain attorney-client privileged information, other confidential information, including information

protected by a non-disclosure or similar agreement, is not protected under the rule and companies generally may not seek to prevent a whistleblower from disclosing information to the SEC by enforcing, or threatening to enforce, a confidentiality agreement.

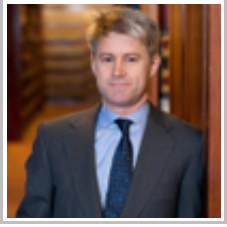
Although attorney-client privileged information may not form the basis of a whistleblower award, the exclusion to the rule raises significant issues relating to what constitutes a privilege waiver for companies which are the subject of a whistleblower allegation. Significantly, while the SEC is not permitted under Rule 21F to give monetary awards based on privileged information, the rule does not address the issue of whether an unsuccessful whistleblower's disclosure of the privileged information to the SEC may nonetheless constitute the basis of a third party claim that the privilege has been waived.

The determination of what constitutes a company's waiver of a claimed attorney-client privilege varies significantly depending on the jurisdiction and the specific facts of the case. While many courts will look to the company's intent and factors such as how carefully the information was protected internally and the position of the person disclosing the information within the organization, other courts have taken a much stricter approach holding that any third party disclosure may constitute a waiver.

While no court to date has considered the issue in the context of Rule 21F, the application of the latter approach would suggest that any information provided to the SEC in connection with a whistleblower's claim may constitute a waiver of the privilege. Accordingly, companies should continuously evaluate their procedures to protect privileged information internally, and to retain the privilege with respect to protected information improperly disclosed. These steps may include limiting dissemination of privileged information internally to a strictly "need to know" basis, preparing strict confidentiality and waiver policies and immediately and vigorously asserting privilege over information that the company believes has been wrongfully disclosed.

Rule 21F became effective in August 2011, and while the SEC has reported a significant number of allegations being made under the rule, it is premature to evaluate the SEC's application of the rule or its effect, if any, on attorney-client privileged information. However, the adoption of this rule and the potential financial incentives that it offers for the disclosure, and possible waiver, of privileged information clearly warrants increased vigilance by companies.

## About the Author



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