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ALERT

SEC Whistleblower Program Demands Attention as Awards Increase

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With payouts totaling $10 million in this month alone, the U.S. Securities and Exchange Commission's (SEC) whistleblower program should be of growing concern to in-house counsel and compliance personnel alike. The False Claims Act has long been a source of worry to those doing business with the government, as its whistleblower provisions provide rich incentives for employees and other insiders to go directly to the government with allegations of fraud. The SEC did not have a comparable program for reporting securities law violations, a situation which changed dramatically with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in 2010. As directed in Dodd-Frank, the SEC in 2011 stood up its current whistleblower program and began broadly promoting the substantial rewards available through the SEC's Office of the Whistleblower.

The SEC's whistleblower program was designed to incentivize tips through the promise of both monetary awards and enhanced protections against retaliation. The program allows certain reporters of securities violations to obtain between 10% and 30% of the recovery obtained by the SEC when the monetary sanctions exceed $1 million. In order to be eligible for an award, the whistleblower must voluntarily provide unique and useful information that leads to a successful enforcement action for violations of securities laws, including financial fraud and corporate disclosures, offering fraud, insider trading, market manipulation, and the Foreign Corrupt Practices Act (FCPA).

Because of the time it takes to investigate allegations and conduct enforcement proceedings, we are just now starting to see an increase in awards related to this bounty program, perhaps a foreshadowing

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of things to come. According to the SEC, since the program started in 2011, the SEC has awarded more than $68 million to 31 whistleblowers. But that figure includes three awards in just the last ten days, when the SEC announced awards totaling nearly $10 million dollars to four separate whistleblowers. In a statement, Sean McKessy, Chief of the Office of the Whistleblower, said that "[t]he recent flurry of awards reflects the high-quality nature of the tips the SEC is receiving as public awareness of the whistleblower program grows... our program particularly rewards those eager to continue helping us throughout the process of bringing an enforcement action."

This cluster of awards should concern compliance officers and in-house legal departments. These large, attention-grabbing payouts may provide just the motivation an employee needs to bypass in-house programs and anonymously report potential violations directly to the government. To address that concern, the SEC has stated that it will consider whether an employee first reported the concerns internally in deciding how much to award and will permit whistleblowers a 120 day "look back" priority to encourage internal reporting. Nonetheless, the enormous monetary incentives to report to the SEC remain. Coupled with the language in the U.S. Department of Justice's new FCPA Pilot Program which limits credit for self-disclosure to companies that report "prior to an imminent threat of disclosure," the recent award activity is a stark reminder of why firms need to encourage employees to raise concerns internally and also have in place adequate procedures for quickly investigating and addressing those matters in real time.

Employers also need to be mindful of the anti-retaliation provisions of Dodd-Frank. An employer may not discharge, demote, suspend, threaten, harass, or take any other retaliatory action against an employee who reports a potential securities law violation. Aggrieved employees have an automatic private right of action in federal court and can receive reinstatement, double back pay, and attorneys' fees and costs. Moreover, the SEC recently issued an interpretative release in August of 2015 clarifying its belief that a whistleblower need not be eligible to recover under the reporting provisions to be protected under the anti-retaliation provisions. This interpretation was quickly followed by a Second Circuit decision holding that internal whistleblowers, as opposed to those who report to the SEC, are also protected under the anti-retaliation provisions. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

Though there remains some split of authority on that aspect of the anti-retaliation protections, the general trend seems to be towards protecting whistleblower activity, both internal and external. Denial of a promotion, an unjustified negative review, harassment, or "constructive discharge" can all run afoul of the anti-retaliation rules. With these robust protections, it is imperative that employers take a measured, careful approach to dealing with whistleblowers. Internal reports of securities law violations should be taken seriously and given a complete and expeditious investigation, ideally by outside counsel. Once an investigation is complete, it is often best to report back to the whistleblower so that they know the company has addressed the issues and did not brush off the allegations. Many employees may be less likely to go to the SEC, despite the incentives to do so, if they feel heard and the company responds appropriately. In order to protect the company, any genuine performance issues should be fully documented and addressed on a separate track from the whistleblower complaint to ensure—and document—impartiality.

While no compliance program or whistleblower policy can provide perfect protection, taking the risks of external reporting encouraged by the SEC's whistleblower program into account will only benefit a business operation. Given the increasingly substantial incentives to report suspected violations, organizations must recognize this phenomenon and face it head-on, or face the consequences.