

SEC Whistleblower Office Issues First Award

The Securities and Exchange Commission announced on Tuesday that an anonymous tipster was eligible to receive the first award paid under its Dodd-Frank-mandated whistleblower program. While the Commission has initially awarded only \$50,000 to the whistleblower, the award could grow substantially as the government collects additional court-ordered sanctions in the case. Significantly, this sum represents the largest award (30% of the recovery) permissible under the whistleblower program. In line with the aggressive posture taken by federal regulators and prosecutors over the past few years, Sean McKessy, Chief of the SEC's Whistleblower Office, declared that "we are open for business."

The SEC has reported that it currently receives approximately eight whistleblower tips per day. And, according to the Commission, tips like the one provided by the whistleblower receiving the award yesterday are saving the government time and money, and preventing investors from being "victimized." Indeed, in announcing the award on Tuesday, the Commission characterized the whistleblower program as an unabashed "success."

Mr. McKessy emphasized yesterday how quickly the SEC moved to pay the whistleblower in this matter. This is consistent with a promise made by Robert Khuzami, Director of the SEC's Division of Enforcement, to take "early and quick" action against corporate fraud. In fact, the speed with which the award announced yesterday was given – the SEC is paying the whistleblower as it receives the sanctions instead of waiting for a final order of total sanctions – is complemented by the logistical ease by which a whistleblower may file a tip with the Commission. The required Form TCR takes but a few hours to complete, and there is a premium for submitting the document sooner rather than later. The SEC will only reward a provider of "original" information, creating an incentive to submit even partial information to lay down a marker for a possible award.

In addition to the incentive to file early, whistleblowers appear to face little risk in submitting good faith tips. First, the SEC professes that it will keep secret a whistleblower's identity to the "fullest extent possible." In fact, if the whistleblower retains an attorney, he or she need not reveal his or her identity even to the SEC at the point of filing the initial tip. Yesterday's announcement, which was noteworthy for its lack of any identifying information about the whistleblower, demonstrates the lengths the SEC will go to protect a whistleblower's identity. Second, employee-whistleblowers are statutorily protected from retaliation by Dodd-Frank, which provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower." Dodd-Frank gives teeth to these whistleblower protections by providing significant penalties for retaliatory actions, including allowing for a private cause of action by employees to seek remedies, including reinstatement with the same seniority status, two times the amount of back pay (with interest), and reimbursement of litigation fees and costs.

The premonition that enterprising plaintiffs' lawyers will seek to become active participants in the whistleblower program is becoming harder and harder to escape. Indeed, a comparison between the SEC's whistleblower program and that of the False Claims Act (FCA) – around which the private bar has set up a robust practice – is irresistible. The Commission modeled its own program on the "best features" of the FCA, which has furnished whistleblowers with billions of dollars over the past quarter century. In the first years after the FCA whistleblower program was implemented, a total of about \$100,000 was awarded to a handful of whistleblowers who filed complaints. But in 2011, 638 tips led to enforcement actions or lawsuits, and whistleblowers earned \$532 million in awards. A similar explosion of tips and awards would not be surprising under the SEC's whistleblower program.

Obscured by the SEC's public statements touting the success of the whistleblower program is the fact that the Commission also denied a second whistleblower's bid for an award. The Commission provided little explanation for this denial, other than stating that the tip did not "significantly contribute" to the enforcement action. By failing to offer any specific concrete information about what made one tip successful and the other unsuccessful, the SEC did not reveal how it is performing the "wheat versus chaff work" of pursuing legitimate complaints while filtering out, for example, mere musings of disgruntled employees. Moreover, it has not provided firms with additional guidance on how organized compliance programs and proactive steps taken by firms to prevent and report wrongdoing factor into a decision to provide an award to a whistleblower.

It bears noting that yesterday's announcement of an award to a single whistleblower reflects one out of the thousands of tips received by the SEC. This first award is no doubt a milestone, but it is still only one award. It remains to be seen how the Commission can effectively react to what appears to be an avalanche of whistleblower complaints, many of which are undoubtedly not worthy of enforcement action.

Regardless of the ultimate outcome, it is clear that the SEC is actively encouraging employees and the investing public to take advantage of the whistleblower program. The SEC's first award under the whistleblower program is not only a signal to potential whistleblowers to keep the tips pouring in, but also a warning to firms that they must redouble their internal compliance measures.

We will continue to evaluate the actions and evolving policies of the SEC's Whistleblower Office, and their impact on your business activities. If you have questions concerning the SEC's whistleblower program – or any governmental whistleblower program – please contact the Ropes & Gray attorneys with whom you regularly work.