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SEC Announces Record Whistleblower Award

On September 22, 2014, the Securities and Exchange Commission (SEC) announced the highest award to date in its whistleblower bounty program: an amount estimated in the range of $30–35 million.[1] Although the SEC maintained confidentiality of the whistleblower's identity as required by law and provided few details about the underlying case, the matter is still instructive. We discuss the award below.

The Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Securities Exchange Act of 1934 to add Section 21F, which created a new bounty program for whistleblowers modeled loosely on the *qui tam* mechanism found in the False Claims Act. Under the new rules, the SEC is authorized to pay awards to whistleblowers that provide the SEC with original information about a securities law violation that led to a successful SEC enforcement action resulting in monetary sanctions over $1 million. The size of the award can range from 10 percent to 30 percent of the amount recovered in the enforcement action, and the SEC has considerable authority to determine the amount of the whistleblower bounty within that range. The rules also broadly prohibit retaliation against whistleblowers, and require the SEC to maintain the anonymity of the whistleblower's identity.

Due to the rules protecting the confidentiality of the whistleblower's identity, the SEC's order provides little information about the September 22 award. Beyond revealing that the whistleblower was an employee in a foreign country, the SEC order and accompanying press release reveal nothing about the company or the basis of the securities law violation. The SEC stated, however, that the whistleblower provided "information about an ongoing fraud that would have been very difficult to detect."

Despite the lack of details, there are several takeaways:

- The award is the largest awarded to date under the new SEC whistleblower bounty rules and more than double the previous record of $14 million.

- The award is the fifteenth the SEC has made since the inception of the whistleblower bounty program in May 2011.

- Based on a press release issued by the law firm representing the whistleblower, one can infer that the whistleblower was represented by counsel throughout the process. Many plaintiff law firms (particularly those that have historically focused on employment or securities class actions) view the SEC whistleblower rules as fertile ground for expansion and have actively been seeking out potential whistleblower clients.

- The SEC order criticized the whistleblower for delaying his or her report to the SEC. During the delay, "investors continued to suffer significant monetary injury that otherwise might have been avoided." Accordingly, the SEC made a downward adjustment to the total award amount.

[1] The SEC's press release and a link to its order is here: http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VCCImBb4JWI

- The order took great pains to justify the award to a foreign national and distinguish the Supreme Court's 2010 decision in *Morrison v. National Australia Bank*, which curtailed the extraterritorial reach of the antifraud provisions found in the federal securities laws.[2]

This award once again underscores that the SEC is serious about its whistleblower bounty program and is encouraging putative whistleblowers from around the world to come forward. Although the SEC has censured one serial complainant who knowingly submitted frivolous information to the SEC on numerous occasions, there is no real downside to the whistleblower who files an erroneous report with the SEC. Many public companies continue to express concern that the bounty program incents employees to go directly to the SEC and bypass the company's own internal reporting systems, which hampers a company's ability to identify and correct potential wrongdoing as early as possible. The combination of the headline-grabbing size of the award, the SEC's criticism of the whistleblower for his or her delay in coming forward and the growing prominence of whistleblower attorneys compensated only when their clients collect payment from the SEC will only serve to exacerbate this tension.

Although awards of this type will continue to put stress on public companies' ability to operate internal whistleblowing systems, maintaining a robust and credible internal reporting system remains the best way to manage these situations. Empirical research shows that most employees prefer to resolve concerns within the organization's own systems and approach regulators or other third parties only as a last resort when they feel that their concerns are not being adequately addressed. Companies are well-served when they set the appropriate "tone at the top" and operate internal reporting programs that employees view as objective and trustworthy. Companies with operations outside the United States should also pay special attention to local laws or customs that may be inconsistent with operating a US-style compliance program.

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- [2] Quoting from the SEC order:

In our view, there is a sufficient U.S. territorial nexus whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the Commission, the U.S. regulatory agency with enforcement authority for such violations. When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas. … Finally, although we recognize that the Court of Appeals for the Second Circuit recently held that there was an insufficient territorial nexus for the anti-retaliation protections of Section 21F(h) to apply to a foreign whistleblower who experienced employment retaliation overseas after making certain reports about his foreign employer, … we do not find that decision controlling here; the whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions, which are generally focused on preventing retaliatory employment actions and protecting the employment relationship.