

Securities Litigation Alert: SEC Announces \$30 Million Whistleblower Award to Non-U.S. Resident

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On Monday, September 22, 2014, the SEC announced that it expected to award between \$30 and \$35 million to a non-U.S. whistleblower who provided the SEC with information about “an ongoing fraud that would have been very difficult to detect.” The SEC’s whistleblower program was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Individuals who voluntarily provide the SEC with original information regarding a possible violation of federal securities laws are eligible for awards of between 10 to 30 percent of recoveries exceeding \$1 million.

The award announced last week is the largest announced by the SEC’s whistleblower program to date and is more than twice as much as the highest previous award. The award would have been even higher but for the whistleblower’s “unreasonable” delay in reporting the misconduct; while declining to specify the time period, the Commission noted that the “lengthy” delay after the whistleblower learned of the violations was not justified “where investors continued to suffer significant monetary injury that otherwise might have been avoided.”

Very few concrete facts have been made public about the underlying case. The SEC is required by law to protect the confidentiality of whistleblowers and does not disclose information that may directly or indirectly reveal a whistleblower’s identity. Nevertheless, the award has implications for any company subject to U.S. securities laws.

First, the magnitude of the award highlights the overwhelming financial incentive for potential whistleblowers to report actual or suspected misconduct directly to the SEC. And because whistleblower awards are calculated as a percentage of the total amount recovered by the SEC, the cases that are most important to the company – *i.e.*, those with the highest potential financial exposure – are also the ones that are most likely to be reported by whistleblowers.

Second, the award demonstrates the SEC’s intent to rely on whistleblower tips from sources outside the U.S. The whistleblower at issue in this case is a foreign resident, and four of the fourteen whistleblower awards announced to date have gone to foreign residents. Sean McKessy, Chief of the SEC’s Office of the Whistleblower, emphasized that the award “shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice” and that “[w]histleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws.”

Incentives for foreign whistleblowers are particularly significant with respect to alleged violations of the U.S. Foreign Corrupt Practices Act (FCPA) – matters that, if proven, can result in hundreds of millions of dollars in penalties – and correspondingly large whistleblower awards. In fiscal year 2013, the SEC received whistleblower tips from 55 countries, including Brazil, Russia, India, China and other countries where there are higher risks of corruption. Approximately 5% of all whistleblower tips received concern alleged violations of the FCPA.¹

Finally, the advent of lottery-sized whistleblower awards makes it all the more important for companies to establish robust and effective compliance programs to prevent, detect and resolve problems early, before they escalate into serious violations of the federal securities laws. Among other things, companies should:

- Reinforce to employees the importance of reporting compliance concerns;
- Train employees on how to report compliance concerns internally and how to respond to those concerns;

¹ SEC, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

- Provide incentives for reporting concerns internally, for example, announcements thanking employees for bringing issues to management's attention;
- Review compliance programs to ensure they include readily accessible internal reporting mechanisms;
- Emphasize in writing and during training programs the company's commitment to addressing compliance concerns respectfully, with discretion, and without retaliation;
- Investigate and resolve compliance concerns promptly and efficiently;
- Develop procedures for identifying, escalating and investigating allegations that raise potential securities law violations or might otherwise involve self-reporting to the SEC; and
- Be prepared for calls from regulators.

For the moment, financial incentives to report misconduct are somewhat tempered by the lack of widespread knowledge regarding the SEC's whistleblower program. However, the SEC is actively publicizing the program and encouraging non-U.S. whistleblowers in particular to report securities law violations. The recent blockbuster award is likely to generate an increased number of whistleblower reports to the SEC. As a result, directors and officers of public companies must be prepared for this new reality when determining how to mitigate compliance risks and respond to allegations of serious misconduct.

SEC Press Release: <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290>.

SEC Whistleblower Order: <http://www.sec.gov/rules/other/2014/34-73174.pdf>.

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