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SEC's Record Whistleblower Award: Context and Key Take-Aways

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The whistleblower program also broadly prohibits retaliation against whistleblowers and requires the SEC to keep the whistleblower's identity anonymous. As such, the SEC revealed few details about this whistleblower or the underlying action, except that the whistleblower lives overseas, that the related violation preceded the enactment of Dodd-Frank and 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 key takeaways:

- The award is the largest awarded to date under the SEC whistleblower bounty rules and more than double the previous record of $14 million.
- The award is the 15th the SEC has made since the whistleblower program's inception in May 2011.
- Based on a press release issued by the law firm representing the whistleblower, the whistleblower appears to have been represented by legal counsel throughout the process. Many plaintiff law firms (particularly those that historically have focused on securities or employment class actions) seem to view the SEC whistleblower rules as fertile ground for expansion and appear actively to be seeking out potential whistleblower clients.
- The SEC order criticized the whistleblower for delaying his or her report to the SEC. While noting the significance of the information and the assistance that the whistleblower provided, the SEC found that the whistleblower unreasonably delayed reporting the violations, noting that 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, in spite of the whistleblower's unsuccessful arguments that the award was below the average percentage awarded to other successful claimants (which reportedly is approximately 24 percent). The SEC's order suggests that the award was on the low side of the 10 percent to 30 percent range.

- 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, and the 2nd Circuit's 2014 decision in Liu v. Siemens, which applied the Morrison ruling to the anti-retaliation provisions of the whistleblower programs created by Dodd-Frank. Altogether, the agency dedicated more than a third of the order to explaining the appropriateness of the whistleblower award in light of these decisions. "In our view," SEC staff wrote in a footnote to the September 22, 2014, whistleblower order, "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," the staff continued, "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."

Many public companies continue to express concern that the bounty program incentivizes employees to go to the SEC directly while bypassing internal reporting systems, thereby undermining public companies' 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 who are compensated only when their clients collect payment from the SEC likely will serve to exacerbate this tension. In addition, although the SEC has censured one serial complainant who knowingly submitted frivolous information to the SEC on numerous occasions, no real downside exists for the whistleblower who files an erroneous report with the SEC.

Maintaining a credible internal reporting system likely remains one of the best ways to manage these situations, as evidenced by empirical research, which shows that most

employees prefer to resolve concerns within their respective organization's systems and that most employees only approach regulators or other third parties as a last resort when they feel that their concerns are not being addressed adequately. Companies with operations outside the United States also should pay special attention to local laws or customs that may be inconsistent with operating a U.S.-style compliance program.

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