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SEC Sends a $30 Million-Plus Warning to Companies: Beware of the Foreign Whistleblower

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In its fourteenth award to a whistleblower under the Dodd-Frank Wall Street Reform and Consumer Protection Act's Whistleblower Program (the "Dodd-Frank Whistleblower Program" or the "Program"),[1] the Securities and Exchange Commission (the "SEC") last week announced the award of more than $30 million to a foreign resident, the fourth whistleblower living outside of the United States to receive such an award. The September 22, 2014 award represents the largest Dodd-Frank whistleblower award to date, more than doubling the previous $14 million high awarded last October. Despite a "downward adjustment" based on the whistleblower's "unreasonable reporting delay,"[2] the SEC's Director of the Division of Enforcement commended the whistleblower for coming to the SEC "with information about an ongoing fraud that would have been very difficult to detect." "This award of more than $30 million shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice," added Sean McKessy, Chief of the SEC's Office of the Whistleblower. The SEC's full September 22, 2014 press release (the "Release") can be found here.

Under the Dodd-Frank Whistleblower Program, the SEC provides awards of 10 to 30 percent of the monetary sanctions collected in actions brought by the SEC and other regulatory and law enforcement authorities that result in sanctions exceeding $1 million. To qualify, an eligible whistleblower must voluntarily provide original information about a possible violation of the federal securities laws. Despite widespread objections by companies and industry groups during the Program's rulemaking period, a Dodd-Frank whistleblower need not report the suspected wrongdoing through the established compliance channels of the organization at issue. If, however, the whistleblower chooses to provide information to the company, he or she must also submit information to the SEC within 120 days in order to remain eligible for a whistleblower award. With the establishment of the Program, the SEC established a framework that mirrors that of the False Claims Act, a well-established statutory whistleblower regime that has resulted in billions of dollars in government recoveries during the past decade alone.[3]

It is far too early to compare the three-year-old Dodd-Frank Whistleblower Program with the False Claims Act—a statute rooted in the post-Civil War period. However, this latest award is further evidence of a steady trend of more frequent and larger awards since the inception of the Program. The SEC awarded its first whistleblower payment in 2012, four more in 2013, and now stands at nine for

2014. "We're pleased with the consistent yearly growth in the number of award recipients since the program's inception," said McKessy in the Release. As detailed in the 2013 Annual Report of the Dodd-Frank Whistleblower Program, the number of whistleblower tips has similarly increased over the first three years of the Program, with the total number of tips rising from 334 for part of 2011,[4] to 3,001 in 2012, to 3,238 in 2013.[5] This trend can be expected to continue, as plaintiffs' law firms become increasingly focused on advertising their services on a worldwide basis to bring such claims forward, seeking to leverage the successes they have enjoyed on the domestic front on to the international stage, incentivized by these increasing—and sizeable—whistleblower awards. Indeed, it should not be surprising that the whistleblower receiving the September 22, 2014 award was represented by a well-known U.S. plaintiffs' firm.

Although little detail was provided regarding the underlying matter, consistent with the SEC's stated policy to protect the confidentiality of whistleblowers under the program, the SEC's September 22, 2014 Order Determining Whistleblower Award Claim (the "Order") clearly articulates the SEC's view that foreign residents remain eligible for awards under the Program:

> 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 . . . . 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.

In so reasoning, the SEC expressly distinguished the recent and well-publicized opinion in *Liu v. Siemens*, __ F.3d __, 2014 WL 3953672 (2d Cir. Aug. 14, 2014). There the Second Circuit found an insufficient territorial nexus as to the anti-retaliation portions of Dodd-Frank, declining to extend those protections—protections that prevent employers from discharging, demoting, suspending, harassing, or otherwise discriminating against a whistleblower—to a foreign resident. "We do not find [the *Liu*] decision controlling here," the SEC announced in the Order, as "the whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions . . . ."[6] The full Order can be found here.

The September 22, 2014 award marks the second significant Dodd-Frank whistleblower award in the last month. On August 29, 2014, the SEC announced its award of $300,000 to an internal audit and compliance professional. Utilizing the Program's window for internal reporting, the whistleblower in the first instance reported the potentially fraudulent conduct within the company. When the company failed to take action, however, the whistleblower reported that same information to the SEC within the requisite 120-day timeframe. In announcing the resulting award, McKessy noted that internal audit, compliance, or legal employees may be eligible for whistleblower awards where their "companies fail to take appropriate, timely action on information . . . first reported internally."[7]

There has been much debate and speculation about the significance of the Dodd-Frank Whistleblower Program since its inception in 2011, with many commentators expressing the opinion that the regime would have no meaningful impact on the compliance and enforcement landscape. To date, a principal argument of such critics had been the absence of significant whistleblower awards. As other developments, such as the enactment of the U.K. Bribery Act, have garnered more headlines and predictions of game-changing significance, the SEC at times seemed to struggle to justify the Program's relevance in the compliance and enforcement mix. This most recent award, however,

stands quite tall in relation to other celebrated whistleblower awards in the United States.[8] And with this most recent award, individuals around the world now may see a path to tens of millions of dollars for bringing to the SEC their compliance concerns.

These increasingly frequent and sizeable whistleblower awards—and the matters to which they relate—underscore the need for companies to reevaluate the strength of their compliance efforts to prevent and detect violations, and to appropriately and quickly consider allegations of wrongdoing reported to them. Companies should consider that employees generally want "to do the right thing" and report wrongdoing when they recognize it, and should accordingly work to increase awareness of the company's compliance efforts, and to make available multiple avenues for employees to raise compliance concerns internally. For instance, companies should consider notifying informants of the corporate response to their concerns to demonstrate the seriousness with which they treat allegations. In most instances, individuals want to know that in reporting a concern they are meaningfully contributing to the ethical well-being of the company. Individuals who believe the company will not appropriately consider their concerns are the most likely to bring these issues to external regulators in the first instance. In this new age of the worldwide whistleblower, companies must think about how to manage their compliance cultures and reporting systems, along with the whistleblowers who stand ready to step forward, in more and more evolved and thoughtful ways.

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[1] 15 U.S.C. § 78u-6. Section 922 of the Dodd-Frank Act (Pub. L. No. 111-203, § 922(a), 124 Stat 1841(2010)) amended the Securities Exchange Act of 1934 by adding Section 21F, entitled "Securities Whistleblower Incentives and Protection."

[2] The SEC found it unreasonable that the whistleblower delayed coming to the Commission for a "period of time" after first learning of the violations, during which time investors continued to suffer avoidable monetary injury.

[3] 31 U.S.C. §§ 3729–3733. Of note, unlike the False Claims Act's whistleblower provisions, a private plaintiff *cannot* pursue a claim under the Dodd-Frank Whistleblower Program in the name of the U.S. government.

[4] Because the final rules became effective August 12, 2011, only seven weeks of whistleblower data is available for 2011.

[5] The Annual Report is available at http://www.sec.gov/about/offices/owb/annual-report-2013.pdf. There has also been much attention at legal and compliance conferences and in the written commentary on the specific impact that the whistleblower program will have on government enforcement under the Foreign Corrupt Practices Act (the "FCPA") 15 U.S.C. §§ 78dd-1. Although somewhat difficult to determine based on the publicly available data, the SEC reports that the total number of FCPA-related tips has increased from 115 in 2012, to 149 in 2013.

[6] The Second Circuit decision is not the only notable judicial opinion that has arguably removed some teeth from the whistleblower protections under Dodd-Frank. The Fifth Circuit has held that the anti-retaliation cause of action did not apply to an employee who was fired after reporting possible FCPA violations internally and then later reported his concerns to the SEC. *See Asadi v. G.E. Energy*, 720 F.3d 620 (5th Cir. 2013).

[7] Of note, in October 2013, the New York County Lawyers' Association's Committee on Professional Ethics issued a formal opinion stating that New York lawyers who act as attorneys on behalf of clients presumptively may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients under the Dodd-Frank Whistleblower Program. *See* https://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf.

[8] Under the False Claims Act, whistleblowers have recovered substantial amounts. For example, in a May 2012 case, four whistleblowers shared an award of $84 million. The U.S. Department of Justice reports that for the 2013 fiscal year, whistleblowers recovered $345 million in total under the False Claim Act. *See* http://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013.

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