

SEC Reforms Whistleblower Program

December 15, 2020

Changes Follow 10-Year Check-Up

In the decade's waning months, the Securities and Exchange Commission awarded the largest payout so far — \$114 million — under its whistleblower program. This reflects the program's continued growth since Congress established it in 2010.

The SEC also recently adopted reforms to its whistleblower program in an attempt to streamline the award evaluation process. Outgoing SEC Chairman Jay Clayton promised that these "rule amendments will help [the SEC] get more money into the hands of whistleblowers, and at a faster pace." It appears the Commissioner will keep this promise. The SEC's fiscal year that began October 1, 2020, has already seen more than \$150 million of whistleblower payouts, which is well on the way to obliterating the previous year's \$175 million.

Key changes include:

- Expanding the bases for awards to include deferred prosecution or non-prosecution agreements with the Department of Justice and settlement agreements with the SEC outside of a judicial or administrative proceeding.
- Clarifying that an award can be based on a tipster's "independent analysis" only if it provides "evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information." While the SEC issued this interpretive guidance, this SEC position is not, in fact, new.
- Narrowing the circumstances under which whistleblowers are protected from retaliation. This revision simply brings the SEC rule in line with what the U.S. Supreme Court had already required in *Digital Realty Trust, Inc. v. Somers*.

- Creating a presumption in favor of awarding the statutory maximum 30% award amount for awards under \$5 million, subject to possible exclusions. The SEC notes that most of its payouts are for awards at or under this threshold.
- Explaining that the SEC does indeed have discretion to consider the dollar amount (and not merely percentage amount) of the award when applying its award criteria under the rule.

Overall, the SEC's whistleblower reforms may, if anything, somewhat increase the risks to which firms are exposed, and firms should persist in their efforts to ensure securities law compliance and to handle with care any potential or actual whistleblowers.

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