CARLTON FIELDS

Record-Breaking SEC Whistleblower Awards Signal the Need for Robust Anti-Retaliation Policies

May 11, 2021

Introduction
Last year saw a significant increase in whistleblower reports to the Securities and Exchange Commission (SEC). The SEC reportedly received 35% more tips, complaints, and referrals for investigation between mid-March and early May 2020 than during the same period in 2019. This uptick will undoubtedly lead to increased SEC enforcement actions and penalties, giving SEC-regulated companies cause for concern. The last year has also seen record payouts to whistleblowers. Given this environment, companies should analyze their compliance program to implement and communicate strong anti-retaliation policies.

The SEC's Whistleblower Program

The SEC's Whistleblower program, initiated through the 2010 Dodd-Frank Act, encourages the public to provide tips and complaints to the SEC regarding potential securities law violations. While the SEC has many sophisticated market-monitoring and other fraud-detection tools, whistleblowers provide the enforcement staff with valuable leads that often shed light into matters that otherwise may have remained hidden.

Since the program's inception in 2011, the SEC has awarded more than $830 million to more than 150 individuals for leads that ultimately resulted in monetary sanctions of more than $1 million. The fourth quarter of 2020 alone saw approximately $176 million in whistleblower awards - almost the same amount awarded in the entire previous fiscal year, which was itself a record-setting year.

That total was driven in part by a single $114 million whistleblower award issued on October 22, 2020. The SEC characterized the whistleblower's actions as "extraordinary" and noted that the whistleblower "suffered serious personal and professional hardships" that resulted from making a report.

These significant awards serve as a reminder to implement and communicate strong corporate anti-retaliation policies.

The Need for Robust Anti-Retaliation Policies

Companies must maintain a zero-tolerance policy for retaliation against whistleblowers. Both the Dodd-Frank Act and Sarbanes-Oxley Act of 2002 prohibit any such retaliation. The U.S. Supreme Court has held that the broader whistleblower protections of Dodd-Frank only apply when the whistleblower made a report to the SEC, not if the matter was only reported internally. But employers rarely, if ever, learn that an employee submitted a tip to the SEC hotline. As a result, employers must approach any situation involving a potential whistleblower with care, both to avoid employee claims and to avoid a possible SEC action for retaliation.

This does not mean curbing an internal investigation of potential violations of the securities laws. To the contrary, companies can receive cooperation credit for investigating and remediating, as well as self-reporting, potential violations in the event of an SEC investigation. Instead, corporate internal investigations must avoid disclosure of the whistleblower's identity, if discovered, and avoid running afoul of any anti-retaliation provisions.

Further, any anti-retaliation policy provisions should be reviewed to ensure that they do not contain language that could be read to discourage whistleblower reports to the SEC. Enforcement actions have been brought against companies with such language.

Conclusion

An uptick in whistleblower reporting is a trend that is likely to continue, especially with the recent announcements of significant whistleblower awards. Accordingly, the need to implement and communicate robust anti-retaliation policies has never been greater.

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