

Dodd-Frank Whistleblower Activity Getting Even Hotter

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Just two weeks ago, we discussed the increased activity in civil litigation and SEC enforcement actions related to [Dodd-Frank whistleblowers](#). When we suggested that readers check back soon for further developments, we did not imagine that the SEC would provide us with fodder for another update quite so quickly. However, on September 22, the SEC turned up the heat even more by announcing its largest ever whistleblower award – a whopping \$30 million award. This award more than doubles the previous largest award of \$14 million, announced last October. While the SEC’s awards are confidential, given that awards range from 10 percent to 30 percent of the sanction imposed in an SEC enforcement action when that sanction exceeds \$1 million, the underlying action must have generated a fine of between \$100 million and \$300 million. According to the SEC’s press release, another noteworthy feature of this award is that it is given to a whistleblower living in a foreign country, which the Commission states “demonstrat[es] the program’s international reach.” Quoting Sean McKessy, the Chief of the SEC’s Office of the Whistleblower, “Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws.” The award itself sheds additional light on the SEC’s view of whistleblower bounties. First, the Commission stated that the claimant’s “unreasonable delay” merited a downward adjustment in the award, suggesting that the fine generated is closer to the \$300 million end of the spectrum than the \$100 million. In addition, the award suggests that a portion of the uncovered scheme pre-dates the establishment of the Dodd-Frank whistleblower program in 2010. The award also explains in some detail the Commission’s view on extraterritoriality and asserts that the Second Circuit’s recent decision in *Liu v. Siemens* (discussed in our September 10 blog post) does not control its decisions on what tips merit a bounty. The SEC stated that the whistleblower provisions of Dodd-Frank dealing with bounties have a different focus than the anti-retaliation whistleblower provisions and so need not have the same extraterritorial reach (a point echoed in reverse in *Liu*). The Commission stated that even if the claimant is a foreign national, or resides overseas, or involves information submitted overseas, or – most importantly – the “misconduct comprising the U.S. securities law violation occurred entirely overseas,” awarding a bounty may be appropriate under Dodd-Frank if the tip results in an action by the Commission regarding violations of this country’s securities laws. Given the unique posture of whistleblower bounties, it is unclear whether the Commission’s view of extraterritoriality will ever need to be reconciled with the Supreme Court’s arguably narrower view described in *Morrison*. In the scarcely two years since the SEC’s program made its first award, awards seem to have grown dramatically in both number and size. The SEC’s first award was in August 2012 for \$50,000. According to the

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SEC's press release, it paid four more awards in fiscal year 2013, and nine thus far this in fiscal 2014. Now, just two years in, the Commission's latest award is 600 times its first award. And, as the SEC stated in its recently-published five-year Strategic Plan (through fiscal year 2018), the agency intends to "build upon" the "successes of the Office of the Whistleblower" by encouraging individuals and entities with "timely, credible and specific information" to come forward. As we said just two weeks ago, check back soon for further developments. The SEC seems interested in keeping this corner of the world abuzz with activity.