CORPORATE COUNSEL
An ALM Website
corpcounsel.com | November 14, 2018

Corporate Whistleblower Developments and Best Practices

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The New Era of Whistleblowing

Federal law has long provided protections to employees who report regulatory violations in a variety of contexts to their employers. But a new era of whistleblowing came into existence in 2011 with the addition of enhanced whistleblower provisions under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") and the establishment of the SEC's Office of the Whistleblower, which has awarded approximately $326 million to 59 individuals since issuing its first award in 2012. Since that time, whistleblowing has snowballed, and 2018 has been no exception. The SEC continues to receive an increasing number of "tips" each year, and there have been particularly notable developments in the area of whistleblower law.

Supreme Court Decides Digital Realty Trust.

The most significant development this year came in February, with the U.S. Supreme Court's decision in *Digital Realty Trust v. Somers*, 138 S.Ct. 767 (2018). There the court held that whistleblower anti-retaliation protection under Dodd-Frank applies only to persons who provide information relating to alleged securities laws violations to the SEC, and does not apply to persons who only make internal complaints or complaints to another government agency.

The court's decision resolved a split between the Fifth Circuit, which restricted the anti-retaliation provision to only those persons who report alleged violations to the SEC, and the Second and Ninth Circuits, which applied the anti-retaliation provision to both categories of whistleblowers. In a unanimous opinion, the court found the definition of whistleblower under Dodd-Frank to be unambiguous because it defines a whistleblower "clear[ly] and conclusive[ly]" as "any individual who provides … information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." The court also emphasized that this definition is consistent with the core objective of Dodd-Frank's anti-retaliation provision; namely, "[to] motivate people who know of securities law violation to tell the SEC."

SEC Announced its Largest-Ever Awards.

Meanwhile, the SEC continued to make history in 2018, announcing the highest Dodd-Frank whistleblower awards to date in March. Two whistleblowers shared a nearly $50 million award, and a third whistleblower separately received more than $33 million. Before these awards, the previous high was a $30 million award in 2014, made to an individual living overseas. Consistent with general practice, the SEC did not publicize which enforcement action the whistleblower award recipients helped to bring but emphasized that "[t]hese awards demonstrate that whistleblowers can provide the SEC with incredibly significant information [enabling the SEC] to pursue and remedy serious violations that might otherwise go unnoticed."

SEC Issued First Award Ever Under the "Safe Harbor" of Exchange Act Rule 21F-4(b)(7).

In April 2018, the SEC announced its first award under the "safe harbor" of the Exchange Act Rule 21F-4(b)(7) (the "Safe Harbor") with an award of more than $2.2 million made to a former company insider whose information

helped the agency start an investigation that led to a significant enforcement action. Typically, in order to be treated as a whistleblower, an individual has to report the information to the SEC first. However, under the Safe Harbor, a whistleblower's initial reporting to another federal agency does not preclude relief from the SEC, provided the whistleblower reports the same information to the SEC within 120 days and otherwise meets the criteria for whistleblower status. In this case, the whistleblower award recipient reportedly first disclosed that information to another federal agency before disclosing it directly to the SEC (within the 120-day period prescribed by statute), making this the SEC's first ever award under the provision.

Practical Preparedness

The increasing frequency and size of whistleblower awards, along with the developments in whistleblower law in 2018, may encourage employees to bypass internal reporting channels and instead go directly to the SEC in order to preserve their rights as whistleblowers under Dodd-Frank. It is therefore more important than ever for companies to implement robust compliance programs and a culture that encourages employees to report suspected misconduct internally.

While there is no right "one size fits all" approach, every company should consider the following guiding principles and components when seeking to develop an effective internal whistleblower program:

- Tone at the Top. Create a strong "tone at the top" to encourage voluntary, good faith internal reports of improper conduct. It can be helpful to highlight examples of positive employee behavior to reinforce conduct that is consistent with company culture.
- Whistleblower Hotline. While public companies in the U.S. are required by Section 301(4) of the Sarbanes Oxley Act to have an anonymous reporting mechanism, these systems are also valuable for private companies. A whistleblower hotline is probably the easiest and least expensive way to improve corporate governance, and a key check on the strength of an organization's internal controls. Indeed, individuals who might otherwise not report a concern due to fear of retaliation or for other reasons, may be encouraged to report matters anonymously rather than not report at all.
- Confidentiality. Companies can never promise complete confidentiality in every circumstance to employees who raise concerns. However, complainants should be offered assurances that the company will take good faith reports seriously, conduct appropriate follow-up, and endeavor to protect confidentiality to the greatest extent possible.
- Anti-retaliation. Companies should ensure that employees are protected against retaliation through appropriate manager training, monitoring, and periodic check-ins. Employee fear of retaliation is one of the biggest impediments to open reporting. In contrast, employees who trust the complaint resolution process are more likely to raise concerns internally and allow companies to identify potential systemic issues sooner.
- Complainant Follow-Up. Where appropriate, internal whistleblower and investigation protocols should include mechanisms for process updates to complainants regarding the status of the investigations. Providing process updates is important for maintaining confidence in the process and to demonstrate to employees that concerns reported in good faith are taken seriously, thus further encouraging internal reporting.
- Tracking and Case Management. Regardless of the mechanism through which a complaint of alleged wrongdoing is submitted, the company should implement a centralized and reasonably uniform system for tracking case intake, management, and final disposition. This not only helps improve efficiency and allocation of resources, but also sets and tracks internal precedent. Consistency helps instill employee confidence in the integrity of the process.
- Publishing Policies and Providing Periodic Training. Communicate with all employees at every level in the organization regarding the whistleblower program and Code of Conduct, to ensure that they are widely published and the subject of regular training. Training should use real-world examples, interactive exercises, and be sure to provide context.
- Periodic Monitoring. Establish monitoring and auditing procedures to continually assess the program's performance.

Whistleblower mechanisms are among the most vital components of any organization's anti-fraud and loss-prevention programs. While the Supreme Court has limited the scope of retaliation actions, employers should continue to find ways to encourage internal reporting, with well-designed and accessible whistleblower programs being a key component. And with whistleblower tips, actions, and awards still on the rise, companies that have not taken appropriate steps to ensure their whistleblower protocols are up to snuff do so at their peril.

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