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Four Things Companies Should Know About the SEC's 2015 Whistleblower Report

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The SEC recently published data showing significant increases in tips received under its Dodd-Frank Whistleblower Program. Released on November 16, the 2015 annual report also provided important guidance to companies on the SEC's whistleblower-related priorities through fiscal year 2016. The SEC's whistleblower program offers bounty payments in exchange for information that leads to successful enforcement actions. Dodd-Frank requires the SEC to report to Congress annually on the program's activities, whistleblower complaints received and the Commission's response to complaints. SEC-regulated companies should be aware of the following four themes that emerged from the 2015 annual report:

(1) Whistleblower Tips Continue to Rise

The SEC continues to receive an increasing number of whistleblower complaints. The SEC received 3,923 total tips in fiscal year 2015, an 8% increase from fiscal year 2014 (3,620). The 2015 numbers also represent a 30% increase from 2012 (3,001), which was the first full year of the program. The bulk of the whistleblower complaints originated from five states: California (646), New York (261), Florida (220), Texas (220) and New Jersey (146). The SEC also received tips from 61 foreign countries, with the highest number originating from the United Kingdom, Canada, China, India and Australia.

Claims for awards continue to rise as well. The Commission paid more than $37 million to eight whistleblowers in 2015. Among other things, that figure included the SEC's highest award ever of $30 million paid to a single whistleblower at the beginning of fiscal year 2015, a maximum bounty payment of 30% of amounts collected in connection with the Commission's first anti-retaliation case, and a bounty of more than $1 million paid to a compliance professional in April 2015.

(2) Complaints of Corporate Disclosure and Financial Reporting Fraud Are Up

The most common complaint categories have remained consistent over the last four years even as tip quantity has steadily increased. Nearly half of all FY2015 tips fall into one of three categories: corporate disclosures and financials (18%), offering fraud (16%) and manipulation (12%). These three categories have been the highest allegation types every year since the SEC started collecting

data in 2012. However, allegations involving corporate disclosures and financials rose in 2015 to 687 complaints—a nearly 13% increase over the prior year. That increase is consistent with the SEC's renewed focus on financial reporting and accounting fraud, including the agency's creation of a Financial Reporting and Audit Task Force in 2013. SEC Enforcement Director Andrew Ceresney reported last month that the Commission brought 134 actions in the financial reporting and audit area in fiscal year 2015—reflecting a significant increase from 98 cases in fiscal year 2014, and 68 cases in fiscal year 2013.

(3) Protection for Internal Reports Remains a Key Focus Area

The 2015 annual whistleblower report highlights the Commission's continued focus on protection for internal reporting. Dodd-Frank explicitly prohibits retaliation against individuals who report securities law violations *to the Commission*, but the statute also includes a separate provision that appears to extend protection to *internal disclosures* made under Sarbanes-Oxley. The SEC attempted to harmonize the apparent inconsistency by enacting rules that restrict bounty payments to only those individuals who report to the Commission, while extending anti-retaliation protection to whistleblowers who report internally under Sarbanes-Oxley regardless of whether the individuals provide the same information to the Commission. Federal courts, however, remain divided over whether the Commission's effort to harmonize the apparent inconsistency through its rule was a reasonable interpretation of the statute.

The Second Circuit recently ruled in *Berman v. Neo@Ogilvy LLC* that whistleblowers who report securities law violations internally under Sarbanes-Oxley but not to the SEC are protected under Dodd-Frank from employer retaliation. That decision created a split with the Fifth Circuit, which ruled in *Asadi v. G.E. Energy (USA), LLC*, that Dodd-Frank affords retaliation protection only to whistleblowers who report to the SEC. While the defendants in Berman have recently signaled that they no longer intend to seek US Supreme Court review, the circuit split sets the stage for potential high court involvement in a future case.

(4) Expect Continued Focus on Confidentiality Agreements

The SEC's annual whistleblower report emphasized the Enforcement Division's continued interest in confidentiality and other types of agreements that could interfere with a whistleblower's ability to report potential wrongdoing to the SEC in violation of Rule 21F-17(a). That rule provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

In April 2015, the Commission brought its first enforcement action under Rule 21F-17(a). That action challenged KBR Inc.'s use of a confidentiality agreement that prohibited witnesses in internal investigations from discussing the subject matter discussed during interviews without prior authorization. The Commission believed that the confidentiality statement violated Rule 21F-17(a) even in the absence of any evidence that the statement prevented KBR's employees from communicating with the SEC, or evidence that the company sought to enforce the statement. Instead, the Commission concluded that the statement alone constituted a violation of Rule 21F-

17(a) because it “impedes such communications by prohibiting employees from discussing the substance of their interview without clearance from KBR’s law department under penalty of disciplinary action including termination of employment.” KBR Inc. agreed to pay a $130,000 penalty to settle the charges.

The SEC’s annual whistleblower report underscored that “[a]ssessing confidentiality agreements for compliance with Rule 21F-17(a) will continue to be a top priority for [the program] into Fiscal Year 2016.” In light of the SEC’s continued focus on these agreements, companies are advised to review company severance agreements and confidentiality policies for compliance with Rule 21F-17(a).

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