

# The SEC Tweaks Its Booming Whistleblower Program

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Securities Litigation and Enforcement and White Collar Defense and Investigations

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Last week, a divided Securities and Exchange Commission amended its whistleblower rules, hailing the changes as adding “clarity, efficiency and transparency to its successful whistleblower program.”<sup>1</sup> Although the agency made a large number of changes to the program, the amendments should not have a significant overall effect on SEC whistleblower activity, which we expect to continue at a high level.

The SEC’s whistleblower program, created nearly ten years ago as mandated by the Dodd-Frank Act, transformed the agency’s enforcement program. Since its first whistleblower award in 2012, the SEC has awarded over \$527 million to 100 individuals, who collectively provided information leading to over 80 enforcement actions obtaining more than \$2.5 billion in financial remedies.<sup>2</sup> The awards, which have ranged from \$50,000<sup>3</sup> to a staggering sum of nearly \$50 million,<sup>4</sup> have provided powerful incentives to individuals with information concerning potential securities-law violations to share it with the SEC.

The most controversial element of the rule amendments was the Commission’s decision *not* to adopt its own 2018 proposal to create a formal mechanism to allow it to reduce the largest whistleblower awards (above \$30 million) if it determined that a particular dollar amount would not be necessary to advance the goals of the whistleblower program.<sup>5</sup> As we discussed in a prior [alert](#), a large number of commenters had criticized this proposal, arguing that it would impose an arbitrary cap on awards and disincentivize whistleblowers who may have information on massive frauds.<sup>6</sup> Although the SEC scrapped its proposal, it announced that it had determined that the proposal was “not necessary” after all, because the agency already had

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<sup>1</sup> SEC Press Release 2020-219 (Sept. 23, 2020), <https://www.sec.gov/news/press-release/2020-219>.

<sup>2</sup> SEC Whistleblower Program Rules, SEC Release No. 34-89963, File No. S7-16-18, at 6 (Sept. 23, 2020), <https://www.sec.gov/rules/final/2020/34-89963.pdf>; SEC Press Release No. 2020-231 (Sept. 28, 2020), <https://www.sec.gov/news/press-release/2020-231>.

<sup>3</sup> “SEC Issues First Whistleblower Program Award,” SEC Press Release 2012-162 (Aug. 21, 2012), <https://www.sec.gov/news/press-release/2012-2012-162htm>.

<sup>4</sup> “SEC Awards Record Payout of Nearly \$50 Million to Whistleblower,” SEC Press Release 202-126 (Jun. 4, 2020), <https://www.sec.gov/news/press-release/2020-126>.

<sup>5</sup> SEC Whistleblower Program Rules, *supra*, at 8-9, 61.

<sup>6</sup> *Id.* at 58-61.

discretion to reduce an award based solely on its dollar amount.<sup>7</sup> Two dissenting Commissioners expressed strong reservations concerning whether the Commission has such discretion.<sup>8</sup> Nonetheless, unless and until a court overturns the SEC's position on this point, we do not expect to see a change in the size or frequency of the largest whistleblower awards.

On the other hand, the amendments may modestly increase the size of awards at the lower end of the range, under \$5 million, which have comprised three-quarters of the number of awards given to date.<sup>9</sup> The Commission created a new presumption that whistleblowers who meet the criteria for awards in that range will receive the statutory maximum of 30 percent of the monetary sanctions awarded in the relevant enforcement action.<sup>10</sup> The presumption is subject to exceptions when the Commission determines that a claimant provided only limited assistance or engaged in certain types of culpable conduct.<sup>11</sup>

Another expansion of the program is a new rule allowing awards based on deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) entered into by the U.S. Department of Justice.<sup>12</sup> Such DPAs and NPAs can involve very large payments, sometimes in the hundreds of millions or even above \$1 billion. Related SEC whistleblower awards, which are calculated based on a percentage of the financial penalty, could therefore be enormous. The new rule also allows awards based on DPAs or NPAs entered into by the SEC (although such resolutions are rare), and codifies the Commission's existing practice of prohibiting an SEC whistleblower award where a separate whistleblower award program more appropriately applies to the related non-SEC action.<sup>13</sup>

One of the dissenting Commissioners criticized a new requirement that a whistleblower submit qualifying information in writing in order to qualify for anti-retaliation protection.<sup>14</sup> We doubt that this requirement will significantly diminish protection against retaliation because most whistleblowers submit information in writing, and now are even more likely to do so since the agency has made the requirement explicit and has created an online "Tip, Complaint, or Referral" portal.<sup>15</sup>

The SEC adopted a large number of other amendments to its whistleblower rules, but most of them involve the SEC's internal processes. For example, a new provision codifies the Commission's practice of barring applicants who submit materially false information or abuse

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<sup>7</sup> *Id.* at 8, 46-50, 61.

<sup>8</sup> "June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better," Commissioner Allison Herren Lee (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23>; Statement of Commissioner Caroline Crenshaw (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/crenshaw-whistleblower-2020-09-23>.

<sup>9</sup> at 7-8, 138-39.

<sup>10</sup> *Id.* at 9, 50-57; SEC Rule 21F-6(c).

<sup>11</sup> SEC Whistleblower Program Rules, *supra*, at 9, 54-55.

<sup>12</sup> *Id.* at 10, 13-23, 149-50; SEC Rule 21F-4(d)(3).

<sup>13</sup> SEC Whistleblower Program Rules, *supra*, at 10, 33-46, 147-49, 170-71; SEC Rule 21F-3(b)(3).

<sup>14</sup> Statement of Commissioner Crenshaw (Sept. 23, 2020, *supra*) ("[B]y limited the anti-retaliation protections to whistleblowers who submit information *in writing*, we fail to do all we can to protect those who cooperate with our exams and investigations.") (emphasis in original); SEC Whistleblower Program Rules, *supra*, at 68-69; SEC Rule 21F-2.

<sup>15</sup> SEC Rule 21F-9(a)(1).

the award application process (such as by submitting three frivolous award applications).<sup>16</sup> These amendments may improve the efficiency of the SEC's whistleblower program, but should not affect the magnitude or number of awards.

In short, nothing in last week's rule amendments should be expected to diminish the vigor of the SEC's whistleblower program. It remains essential that companies continue to ensure that their culture and processes encourage whistleblowers to address issues internally, and prevent managers from retaliating against employees who report potential wrongdoing internally or to the government.

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<sup>16</sup> SEC Rule 21F-8(e); SEC Whistleblower Program Rules, *supra*, at 11-12, 87-93.

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