A Review of Recent Whistleblower Developments: April 15th

Monday, April 15, 2019

Whistleblower Developments is a periodic report covering significant cases, decisions, proposals, and legislation related to whistleblower statutes and how they may impact your business. Recent developments include:

- Fifth Circuit Affirms SOX Dismissal for Failure of “Reasonable Belief”
- CFTC Issues a Hefty Whistleblower Award to Single Whistleblower
Fifth Circuit Affirms SOX Dismissal for Failure of “Reasonable Belief”

On February 15, 2019, the Court of Appeals for the Fifth Circuit, in Wallace v. Andeavor Corp., No. 17-50927 (5th Cir. Feb. 15, 2019), affirmed dismissal of a Sarbanes-Oxley whistleblower because it concluded that the plaintiff did not have an objectively reasonable belief that the defendant company had violated the SEC’s reporting requirements. The case had previously been remanded by the Fifth Circuit because it had concluded that the plaintiff had pleaded a reasonable belief regarding potential SEC disclosure violations that could survive the company’s motion to dismiss. See Wallace v. Tesoro Corp., 796 F.3d 468, 474-75 (5th Cir. 2015). After discovery, the district court had granted the company’s motion for summary judgment and the plaintiff again appealed.

The facts were quite simple. After being tasked to investigate the company’s financial performance, the plaintiff had come to believe that the company was improperly booking taxes as revenues for internal purposes. Around the same time, the company terminated the plaintiff for what it asserted was poor performance and creating a hostile work environment. The Fifth Circuit focused on whether the plaintiff had an objectively reasonable belief that the company had misreported its revenue. The court noted that the plaintiff had extensive business experience and familiarity with the company’s internal accounting system. It also noted that he had signed a sub-certification during the period in question, stating that he had no reason to know why the company’s annual report on Form 10-K could not be certified. That annual report appeared to disclose the company’s treatment of the taxes at issue. The plaintiff claimed that he had uncovered the problems with the company’s revenue reporting in a period not covered by his certification. The court rejected this argument because the same disclosures existed throughout the period in question, and those disclosures fairly disclosed the treatment of the company’s taxes.

CFTC Issues a Hefty Whistleblower Award to Single Whistleblower

On March 4, 2019, the U.S. Commodity Futures Trading Commission (CFTC) publicized a whistleblower award of over $2 million made to an individual for providing expert analysis in cooperation with a related action instituted by another federal regulatory agency. This award is particularly remarkable because the individual whistleblower who received it was unaffiliated with the company that the CFTC had charged, and the CFTC had issued this award while there was a related action pending by another federal regulator. This is the first award of its kind that the CFTC has made to an unaffiliated whistleblower.

As dictated by its confidentiality provisions, the CFTC did not provide any information that would reasonably be expected to reveal the whistleblower’s identity. Therefore, the CFTC did not provide any information about the individual whistleblower, nor did it provide any details regarding the enforcement proceedings
or the exact dollar amount and percentage of the monetary sanctions awarded. In addition to its novelty, this award also demonstrates the CFTC’s ongoing commitment to its whistleblower award program, and it indicates the CFTC’s willingness to continue to expand its whistleblower award program.

Federal Appellate Court Upholds Nearly $8 million Whistleblower Verdict

As we previously reported, in February 2017 a jury awarded Sanford Wadler nearly $8 million against his former employer, Bio-Rad Laboratories, Inc. (Bio-Rad), for his claims for whistleblower retaliation under the Sarbanes-Oxley Act, the Dodd-Frank Act, and California law allowing wrongful termination claims. Mr. Wadler was formerly Bio-Rad’s general counsel. At trial, Mr. Wadler claimed the company fired him for raising to the company what he claimed at the time were potential violations of the Foreign Corrupt Practices Act (FCPA) in China. Bio-Rad defended against those claims, asserting Mr. Wadler’s report regarding those potential violations was a last-ditch effort to cover up his own compliance failures.

Bio-Rad appealed that victory to the federal Ninth Circuit Court of Appeals, claiming the jury received faulty instructions that conflated the FCPA, a law, with the U.S. Securities and Exchange Commission’s rules and regulations. Sarbanes-Oxley protects whistleblowers who raise violations of SEC rules and regulations from retaliation for raising those issues. The Ninth Circuit agreed with Bio-Rad, ruling the verdict was based on error insofar as it was based on Mr. Wadler’s Sarbanes-Oxley claim. Nevertheless, the Ninth Circuit found there was enough evidence presented to the jury, which otherwise was correctly instructed, to find in Mr. Wadler’s favor on his other claims. The Ninth Circuit then remanded the case to the trial court, to consider whether a retrial on Mr. Wadler’s Sarbanes-Oxley Act claim was needed.

After the Ninth Circuit handed down its decision, Bio-Rad asked the Court to reconsider it, claiming the Ninth Circuit had overlooked important parts of the trial record, and the Court ultimately affirmed the verdict on legal arguments that were not considered at trial. On April 8, 2019, the Ninth Circuit denied Bio-Rad’s request for a re-hearing. We will provide further updates as they arise.

SEC Issues $50 Million Whistleblower Award – Its Third-Largest Single Award

On March 26, 2019, the SEC announced it had awarded $50 million to two whistleblowers for helping the SEC launch a successful enforcement action. This award brings the agency's total whistleblower award payments to $376 million since the whistleblower program began in 2011. (For comparison purposes only, DOJ has paid whistleblower bounties totaling over $4 billion during the same eight-year period.)

According to the SEC’s press release, one of the whistleblowers received a $13 million award, and the other received a $37 million award, which makes this award the third-largest single award paid after the $49 million award made in March 2018 and a $39 million award made in September 2018.
Although the SEC did not identify the enforcement action in its press release, counsel for one of the whistleblowers has since divulged the award was made in connection with the $267 million settlement reached with JPMorgan Securities, LLC and JPMorgan Chase Bank N.A. One of the whistleblower award recipients is an as-yet unidentified JPMorgan executive. Initiated in December 2015, the SEC’s enforcement action asserted that JPMorgan deprived its clients of essential information they needed to make well-rounded investment decisions by showing preference to JPMorgan’s proprietary investment products without proper disclosure of this practice. According to the SEC, those practices compromised asset allocation and fund manager selection.

In its press release, the SEC emphasized that the whistleblowers’ “high-quality information” assisted it in effectively pursuing justice against securities law violators.

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