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:

- SEC to Study Amended Whistleblower Rules and Potential Revisions
- S.D.N.Y. Dismisses Dodd-Frank Whistleblower Retaliation Claim Because Alleged Whistleblower Failed to Report Information to SEC by an Approved Method
S.D.N.Y. Affirms SEC’s Rulemaking Authority for Rule 21F-17 of the Exchange Act, Prohibiting Any “Person” from Interfering with Whistleblowers’ Communications with the SEC

SEC Whistleblower Program Hit $1 Billion Mark With Large Awards in Third Quarter of 2021

SEC to Study Amended Whistleblower Rules and Potential Revisions

On August 2, 2021, SEC Chairman Gary Gensler announced that he had directed the SEC staff to prepare for the SEC’s consideration of potential revisions to certain rule amendments adopted by the SEC in September 2020. Chairman Gensler noted concern that amendments to two rules might discourage whistleblowers from coming forward: (1) an amendment to Rule 21F-3(b)(3) that would preclude the SEC, in some cases, from making an award in related enforcement actions brought by other authorities if a second whistleblower program might apply to the action; and (2) an amendment to Rule 21F-6 that would provide the SEC with the discretion to reduce an award based on its absolute size.

S.D. N.Y. Dismisses Dodd-Frank Whistleblower Retaliation Claim Because Alleged Whistleblower Failed to Report Information to SEC by an Approved Method

On August 11, 2021, the United States District Court for the Southern District of New York dismissed a Dodd-Frank Act whistleblower retaliation claim because the plaintiff did not qualify as a “whistleblower” under SEC regulations. Moniodes v. Autonomy Cap. (Jersey) LP, No. 1:20-CV-5648-GHW, 2021 WL 3605385 (S.D. N.Y. Aug. 11, 2021). The plaintiff, who was responsible for overseeing his firm’s cybersecurity compliance efforts, determined the company “was not adequately securing its customers’ data and the data on its employees’ mobile devices.” 2021 WL 3605385, at *2. This information was relayed to the SEC through another company employee on a conference call that the plaintiff had joined. At the SEC’s request, the firm began remedial actions, and the plaintiff was later terminated. The defendants moved to dismiss the plaintiff’s retaliation suit on the grounds that the plaintiff was not a “whistleblower” because he had not provided information to the SEC in the manner required by the SEC rules, i.e., by mail, fax, or the Commission’s website. Id. *3 (citing 17 C.F.R. § 240.21F–9(a) (2020)). The court concluded that “[b]ecause a conference call is not one of the methods prescribed by Rule F–9(a), Plaintiff has not alleged that he was a whistleblower under Dodd–Frank, and therefore has not stated a claim for retaliation.” Id. at *8.

S.D.N.Y. Affirms SEC’s Rulemaking Authority for Rule 21F-17 of the Exchange Act, Prohibiting Any “Person” from Interfering with Whistleblowers’ Communications with the SEC

On July 21, 2021, in SEC v. Collector’s Coffee Inc., No. 19cv4355 (VM), 2021 WL 3082209 (S.D. N.Y. July 21, 2021), the United States District Court for the Southern District of New York concluded that Rule 21F-17 - which prohibits any “person” from
taking “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” (17 C.F.R. § 240.21F-17(a)) – “constitutes a proper use of the SEC’s rulemaking authority.” 2021 WL 3082209, at *3. The SEC had brought charges against individuals who the SEC alleged, *inter alia*, had violated Rule 21F-17 by enforcing confidentiality agreements with investors, not employees. The defendants moved to dismiss, arguing that Rule 21F-17 exceeded the SEC’s rulemaking authority because it applied to any “person” rather than employees who might be in a position to blow the whistle. 2021 WL 3082209, at *2. The court concluded that the Dodd-Frank Act “allows eligibility for whistleblower status, and the various incentives and protections that come with that status, to extend beyond the employer-employee relationship” (*id.*) and thus concluded that Rule 21F-17’s application to “all persons” was not improper.

**SEC Whistleblower Program Hit $1 Billion Mark With Large Awards in Third Quarter of 2021**

The SEC Whistleblower Program has paid more than $1 billion to 208 whistleblowers in its history. This bounty mark was met in September 2021– a very busy month for the Whistleblower Program, when the SEC paid an award of $110 million:

- The SEC surpassed the $1 billion mark on September 15, 2021, when it announced the award of approximately $110 million, consisting of an approximately $40 million award in connection with an SEC enforcement matter and an approximately $70 million award arising out of related actions by a different agency. This is the second-largest award in the history of the whistleblower program. While the SEC had opened an investigation prior to receiving the whistleblower’s information, the whistleblower provided significant independent analysis that substantially advanced the SEC's and another agency’s investigations. The SEC also noted that the whistleblower had suffered personal and professional hardship as a result of the whistleblower’s activity.

- A second whistleblower received an award of $4 million with respect to the same enforcement matter. The second whistleblower provided original information that led to the successful enforcement action, but this information was provided to the SEC after the investigation was opened and the SEC had undertaken significant investigative steps. The second whistleblower’s information was more limited in comparison to the information and assistance provided by the first whistleblower.

- On September 24, 2021, the SEC announced an award of $36 million to a whistleblower who provided the SEC with information and assistance that significantly contributed to the success of an SEC enforcement action, as well as actions by another federal agency. The whistleblower provided crucial information on an illegal scheme to the SEC and the other agency, and met with the authorities on multiple occasions to identify key documents and witnesses. The SEC noted, however, that the whistleblower delayed bringing the information to the SEC for more than five years and was culpable in the scheme,
although the whistleblower did not direct, plan, or initiate the scheme. Two other individuals were denied whistleblower awards because their information, provided long after the SEC had begun its investigation, did not assist the investigation.

- On September 17, 2021, the SEC announced awards of approximately $11.5 million to two whistleblowers whose information and assistance contributed to the success of an SEC enforcement action. The first whistleblower received an award of nearly $7 million, in recognition of the fact that the whistleblower’s information resulted in the SEC opening the investigation and thereafter provided substantial assistance to the SEC in identifying witnesses and understanding difficult-to-detect wrongdoing. The second whistleblower received more than $4.5 million – a lower award, which reflected the fact that the second whistleblower’s information was provided after the investigation was already underway and that the whistleblower had delayed reporting the information for several years after becoming aware of the wrongdoing.

- On August 27, 2021, the SEC announced awards to five whistleblowers who provided information to the SEC in connection with three enforcement actions.
  - In the first order, the SEC awarded $1.2 million to a whistleblower who provided independent analysis based upon a complex algorithm the whistleblower created and applied to publicly available data. The whistleblower’s information saved the SEC staff time and resources and assisted the SEC during settlement negotiations of an enforcement action.
  - In the second order, the SEC awarded $1 million to three individuals whose information and assistance led to a successful enforcement action. These whistleblowers held compliance roles at the subject company, but consistent with the SEC’s rules, they were eligible for an award because they submitted their information to the SEC more than 120 days after the alleged conduct had been reported internally.
  - In the third order, the SEC awarded a whistleblower more than $350,000 for providing independent analysis that led to a successful enforcement action. Based on unusual effort and expertise developed over many years, the whistleblower identified patterns among publicly available information that allowed the Commission to quickly identify and prevent wrongdoing and to preserve assets.

- On July 21, 2021, the SEC announced a $2.9 million whistleblower award, which was adjusted downward based on one “negative” factor: unreasonable delay. The SEC noted that the enforcement staff was not aware of the wrongdoing until it received the whistleblower tip and that the whistleblower’s information was crucial to the charges brought. The $5 million presumptive award called for under the September 2020 amendment to Rule 21F-6(c) did not apply, however, because the whistleblower had submitted the information to the SEC two years after the whistleblower first suspected a possible securities law violation.
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