The SEC Chair discusses the whistleblower program’s achievements and importance and how the agency will fight to ensure that whistleblowers continue to be heard.

On April 30, US Securities and Exchange Commission (SEC or the Commission) Chair Mary Jo White spoke at the annual Ray Garrett Jr. Corporate and Securities Institute at Northwestern University School of Law in Chicago. Her focus was the remarkable growth and importance of the Commission’s whistleblower program. White noted that since the Dodd-Frank Act established the program in 2010, the SEC increasingly sees itself “as the whistleblower’s advocate.”[1]

Chair White commented on the somewhat unexpected volume and remarkable high quality of the tips that the SEC has received and the fact that good information from real insiders with knowledge about wrongful conduct makes the agency far more efficient, which permits it to conserve precious resources and allows the SEC to bring enforcement actions more quickly. In 2013 and 2014 combined, the Commission received about 6,800 tips, with the 2014 volume increasing by 20%. In the first quarter of 2015, the Whistleblower Office has seen an additional 20% increase in tips over the same quarter in 2014.

Of particular interest is the effect that the SEC’s whistleblower program has had on internal compliance functions, which the Commission views as “stronger than ever—if not stronger.” According to Chair White, 80% of those who have received awards...
under the SEC’s program first reported their concerns internally within the companies where they work.[2] She highlighted that, although under the rules, corporate officers, directors, and compliance and internal audit personnel are not generally eligible to receive whistleblower awards, there are exceptions, and there have been two such awards—to a company officer and to a compliance professional. In each instance, the issues identified were first reported internally, as the rules require. She also expressed that the whistleblower program encourages companies to self-report misconduct to the Commission, because they know that their employees may do the self-reporting on the companies’ behalf.

Moreover, the Commission wants to “ensure open lines of communication between whistleblowers and the SEC” and it has, most recently, acted on that goal by reviewing and evaluating confidentiality and similar agreements from numerous companies to evaluate whether individuals are impeded from reporting perceived violations of law. A recent enforcement action, ongoing investigative activity, and public statements from Commission leadership have resulted in careful scrutiny of employment and confidentiality agreements and codes of conduct by registrants and issuers to evaluate whether they are observing the lines being drawn by the Commission.

Chair White, in her remarks, attempted to clarify these muddy waters a bit, stating that the applicable rule, Rule 21F-17, is not “a sweeping prohibition on the use of confidentiality agreements.” She went further to explain that the Commission expects companies to continue to explain the scope of attorney-client privilege in the context of an internal investigation and that companies “may continue to protect their trade secrets or other confidential information through the use of properly drawn confidentiality and severance agreements.” However, individuals in such circumstances or who review such agreements need to understand their right to report possible violations to law enforcement authorities.

Ominously, Chair White also identified as Commission concerns employee agreements “mandating that [employees] forgo any whistleblower award or represent, as a precondition to obtaining a severance payment, that they have not made a prior report of misconduct to the SEC.” It is thus likely that such provisions will be scrutinized by the Commission’s enforcement staff.

Plainly, the Commission takes its role as “Whistleblower’s Advocate” very seriously. Chair White spoke about the somewhat controversial SEC position that Dodd-Frank authorized the Commission to bring retaliation claims against employers that are believed to have discriminated against whistleblowers.[3] From the language and tone of this speech, and from the SEC’s recent activity in this area, including an enforcement action and a whistleblower award, we can expect to see the Commission continue its advocacy on behalf of whistleblowers.

[1]. All references herein are to “The SEC as the Whistleblower’s Advocate,” a speech given by Chair Mary Jo White on April 30, 2015 at the Ray Garrett, Jr. Corporate and Securities Law Institute - Northwestern University School of Law, Chicago, Illinois. View her remarks here.

[2]. Seventeen whistleblowers have received awards, so far, with three receiving more than $1 million and
the highest being $30 million. Recently, media reports have highlighted the fact that the SEC has been slow
to make whistleblower awards, and there appears to be a significant backlog in such claims. Chair White did
not address those reports in her speech.

[3]. The Commodity Futures Trading Association, interpreting the same Dodd-Frank provision, has taken the
position that although retaliation actions are authorized, the agency itself does not have authority to bring
those actions. See, e.g., 17 C.F.R. § 165 Appendix A to Part 165 (Guidance with Respect to the Protection of
Whistleblowers Against Retaliation)

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