

## SEC Makes Its First Award Under the Dodd-Frank Whistleblower Program

*If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.*

**Erich T. Schwartz**  
Washington, D.C.  
202.371.7660  
erich.schwartz@skadden.com

**Charles F. Walker**  
Washington, D.C.  
202.371.7862  
charles.walker@skadden.com

**Colin D. Forbes**  
Washington, D.C.  
202.371.7604  
colin.forbes@skadden.com

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1440 New York Avenue, NW,  
Washington, D.C. 20005  
Telephone: 202.371.7000

Four Times Square, New York, NY 10036  
Telephone: 212.735.3000

**WWW.SKADDEN.COM**

### The Award

On August 21, 2012, the Securities and Exchange Commission (SEC) issued its much-anticipated first award under its new whistleblower program.<sup>1</sup> The whistleblower, who chose to remain anonymous, will receive nearly \$50,000, representing the statutory maximum of 30 percent of the amount collected in the SEC enforcement action to date.<sup>2</sup> Additional sanction amounts remain unpaid, and further related sanctions may be assessed against other alleged violators. Any increase in the amount collected by the SEC will result in a concomitant increase in the whistleblower's award.

It is striking that the SEC's press release provided virtually no information concerning the whistleblower or the enforcement action to which he or she contributed. In a conscious effort to protect the whistleblower's anonymity, the SEC's press release simply states that the whistleblower "provided documents and other significant information" that "helped the Securities and Exchange Commission stop a multi-million dollar fraud."<sup>3</sup>

### Assessing the Award

The decisions to pay the maximum award permitted by law and to scrupulously protect the whistleblower's anonymity appear calculated to demonstrate that the SEC intends to be aggressive in encouraging potential whistleblowers to make use of the new bounty program.<sup>4</sup> Furthermore, although the first SEC whistleblower award comes more than two years after Congress passed Dodd-Frank and more than a year after the SEC adopted final rules implementing the whistleblower bounty program, Chairman Mary L. Schapiro said the program is "already becoming a success," and that the SEC is receiving "high-quality tips that are saving our investigators substantial time and resources."<sup>5</sup>

The first whistleblower award is emblematic of a broader effort under Chairman Schapiro and Enforcement Director Robert S. Khuzami to enhance enforcement efforts by altering the dynamic of the investigative process in ways that provide the enforcement

1 *In the Matter of the Claim for Award in Connection with Notice of Covered Action 2012*, Exchange Act Release No. 67,698 (Aug. 21, 2012). The SEC's whistleblower program came into being as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Among other things, Dodd-Frank requires the SEC to award whistleblower bounties of between 10 percent and 30 percent of monetary sanctions collected by the SEC in cases where a whistleblower voluntarily provides original information to the SEC that leads to a successful enforcement action resulting in sanctions of more than \$1 million. Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841-1849 (2010). On May 25, 2011, the SEC adopted final rules implementing the new whistleblower bounty program. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545 (May 25, 2011).

2 Press Release No. 2012-162, Sec. & Exch. Comm'n, SEC Issues First Whistleblower Program Award (Aug. 21, 2012) (Press Release).

3 *Id.*

4 Notwithstanding the care taken by the SEC to protect the whistleblower's anonymity in this release, there are circumstances in which a whistleblower's identity can be revealed, including through discovery or mandatory disclosures in an enforcement proceeding. 15 U.S.C. § 78u-6(h)(2)(A). Indeed, given that it appears there may be ongoing litigation in the matter at issue, more may be learned about this whistleblower.

5 *Id.*

staff with additional avenues of information.<sup>6</sup> Individuals in possession of sensitive, confidential business documents and information belonging to issuers and regulated entities now have concrete evidence that sharing such material with the SEC can lead to a significant payoff.<sup>7</sup>

In this environment, companies may find it challenging to control the scope and pace of internal and government investigations, or to qualify for cooperation credit. To the extent that they have not already done so, companies should assess and, if necessary, strengthen internal compliance programs, evaluate the effectiveness of internal reporting systems, and formally prepare to respond to whistleblower complaints. We have previously written in more detail regarding steps to be considered in that regard.<sup>8</sup>

In addition to announcing the award, the SEC announced that it had denied a request for an award by a second whistleblower, “because the information provided did not lead to or significantly contribute to the SEC’s enforcement action, as required for an award.”<sup>9</sup> To the extent that this second claimant did not satisfy the requirements for an award, the SEC’s decision to deny an award is unsurprising. Companies should take little solace. The SEC has demonstrated that it will aggressively compensate whistleblowers who provide actionable tips, which have been pouring in at a rate of “about eight tips a day” since August 2011.<sup>10</sup>

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6 See, e.g., Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Exchange Act Release No. 61,340 (Jan. 13, 2010) (providing concrete guidance regarding benefits to individual wrongdoers for cooperating with SEC enforcement investigations). For a discussion of the interplay between the Dodd-Frank whistleblower program and the SEC’s cooperation initiative, see Skadden, Arps, Slate, Meagher & Flom LLP, *Dodd-Frank Act Tempts Securities Law Whistleblowers with Lucrative Cash Bounties, Highlighting the Need for Effective Compliance Procedures* (July 22, 2010).

7 Certain company insiders and certain types of information are ineligible for a payoff. See 17 C.F.R. §§ 240.21F-4(b)(4), 240.21F-8(c). For a more detailed discussion of these exceptions, as well as exceptions to the exceptions, please see Skadden, Arps, Slate, Meagher & Flom LLP, *SEC Finalizes Rules Implementing Whistleblower Bounty Program* (June 14, 2011) (Final Rules Alert).

8 See Final Rules Alert.

9 Press Release.

10 *Id.*