November 3, 2020

Record SEC Award and 100+ Awards Granted: So Why Are Some Whistleblower Law Firms Concerned?

INTRODUCTION

Two recent public announcements by the United States Securities and Exchange Commission ("SEC" or "Commission") have grabbed the attention of the media and SEC whistleblower law firms.

In the first of these public statements, on September 28, 2020, the Commission revealed that the SEC whistleblower program granted its 100th whistleblower award.[1] According to the Chairman of the SEC:

> Today's award marks a milestone for the whistleblower program. This whistleblower is the 100th individual to receive an award under the program since its inception, and the 33rd individual awarded so far this year. The pace and the amounts of the awards in recent years underscore the Commission's commitment to increasing the efficiency and effectiveness of the whistleblower program.[2]

---

[1] *See* Skinner, Celeste, "SEC Grants 100th Whistleblower Award, Tipster Receives $1.8 Million", Financial Magnates (Sept. 29, 2020) as found on October 29, 2020 at https://www.financemagnates.com/institutional-forex/regulation/sec-grants-100th-whistleblower-award-tipster-receives-1-8-million/; SEC press release, "SEC Issues $1.8 Million Whistleblower Award to a Company Outsider" (Sept. 28, 2020), as found on October 29, 2020 at https://www.sec.gov/news/press-release/2020-231.

[2] SEC press rel., "SEC Issues $1.8 Million Whistleblower Award to a Company Outsider" (Sept. 28, 2020).

Approximately three weeks later, on October 22, 2020, the SEC announced that it granted a $114 million whistleblower award.[3] That award was by far the largest SEC whistleblower award granted to date.[4] The SEC Chairman commented on this milestone as well:

> Today's milestone award is a testament to the Commission's commitment to award whistleblowers who provide the agency with high-quality information.... Whistleblowers make important contributions to the enforcement of securities laws ...[5]

These two announcements would appear to be tremendous milestones that should be encouraging to whistleblower law firms. So why have they been generating controversy? The answer lies in the timing of these awards and announcements in relation to the recent amendments to the SEC's rules implementing its whistleblower program.

WHY SOME WHISTLEBLOWER LAW FIRMS ARE CONCERNED ABOUT THE NEW AMENDMENTS TO THE SEC WHISTLEBLOWER RULES

To understand the concerns being expressed by some whistleblower law firms, a bit of history is required. The SEC whistleblower program was created in 2010 as part of the Dodd-Frank Act.[6] Approximately one year later, the SEC enacted its implementing rules for the whistleblower program.[7]

---

[3] Order Determining Whistleblower Award Claim, Sec. Exch. Act. Rel. No. 90247, Whistleblower Award Proc. No. 2021-2 (Oct. 22, 2020), as found on October 29, 2020 at https://www.sec.gov/rules/other/2020/34-90247.pdf.

[4] *See* SEC press release, "SEC Issues Record $114 Million Whistleblower Award" (Oct. 22, 2020) as found on October 29, 2020 at https://www.sec.gov/news/press-release/2020-266.

[5] *Id*.

[6] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6.

[7] Federal Register, Vol. 76, No. 113, at 34300 (June 13, 2011), as found on October 29, 2020 at https://www.govinfo.gov/content/pkg/FR-2011-06-13/pdf/2011-13382.pdf.

For approximately the next seven years, those rules remained unchanged until, on June 28, 2018, the SEC published proposed amendments to its whistleblower rules.[8] Over the ensuing two-plus years, much criticism was levied toward the proposed amendments.

One of the most highly publicized and criticized proposals was what many classified as a "cap" on SEC whistleblower rewards. According to that proposed amendment, for enforcement actions in which the SEC collected more than $100 million, it would be allowed to reduce a whistleblower's award to an amount that the Commission in its discretion deemed to be "reasonably necessary", so long as the final award still fell within the 10% - 30% range mandated by the Dodd-Frank Act. The concept of capping SEC whistleblower awards was criticized by whistleblowers, whistleblower law firms, SEC whistleblower attorneys, United States Senators from both political parties,[9] and many others.

On September 23, 2020, the Commission voted to approve the final amendments to the SEC whistleblower rules.[10] Those final amendments were to become effective thirty days after publication in the Federal Register,[11] which meant as early as October 23, 2020.

Although the Commission dropped the proposed "cap" rule from the final amendments, the Commission asserted its authority to issue awards denominated in

---

[8] Federal Register, Vol. 83, No. 140, at 34702 (July 20, 2018), as found on October 29, 2020 at https://www.federalregister.gov/documents/2018/07/20/2018-14411/whistleblower-program-rules.

[9] *See, e.g.*, Letter from six U.S. Senators to SEC Chairman (Sept. 17, 2020), as found on October 29, 2020 at https://www.banking.senate.gov/imo/media/doc/Ltr_to_Chair_Clayton_WB_rule_09172020.pdf; Letter from Senator Charles E. Grassley, Chairman of the U.S. Senate Committee on the Judiciary to SEC Chairman (Sept. 18, 2018), as found on October 29, 2020 at https://www.sec.gov/comments/s7-16-18/s71618-4373264-175545.pdf.

[10] *See* SEC press release, "SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program" (Sept. 23, 2020), as found on October 29, 2020 at https://www.sec.gov/news/press-release/2020-219.

[11] *See* final amendments to Whistleblower Program Rules, Dates section, as found on October 29, 2020 at https://www.sec.gov/rules/final/2020/34-89963.pdf.

dollar figures rather than in percentages.[12] This led some whistleblower law firms to question whether this is merely a procedural clarification as the Commission's commentary suggests, or whether it is really a backdoor way to slide in a discretionary cap on whistleblower awards under a different name.

The fear that those whistleblower law firms have is that the SEC could determine that a particular whistleblower would satisfy its historical criteria entitling him or her to a particular percentage award, but then, rather than issuing an award in percentage terms, instead issue an award denominated in a flat dollar amount that is lower than that percentage would have dictated, in essence imposing a cap or "knock down".

WHY SOME WHISTLEBLOWER LAW FIRMS ARE CONCERNED ABOUT THE TIMING OF THE RECENT MILESTONE AWARDS

Some SEC whistleblower attorneys have noted that the Commission's announcement of its 100th whistleblower award came just five days after the Commission voted to pass its controversial amendments to the SEC whistleblower rules.

Other SEC whistleblower attorneys have pointed out that the Commission granted the record $114 million award on October 22, 2020, just one day shy of when the new amended rules could have first become effective.

The fear that some whistleblower law firms have is that the Commission planned the timing of these awards and announcements either to distract attention away from the vote to pass the amended rules and their becoming effective, or to counteract any negative publicity garnered by the final amendments.

Given the initial shock over the Commission's original "cap" proposal and the ensuing two-plus year fight to prevent it from being implemented, it is understandable why those concerns have arisen. However, in the interests of objectivity, it might be worthwhile to examine whether possible alternative explanations might exist.

THE COMMISSION WOULD NOT NEED TO DENOMINATE WHISTLBLOWER AWARDS IN DOLLARS TO "CAP" THEM

The Dodd-Frank Act mandates that the combined SEC whistleblower awards granted to all eligible SEC whistleblowers for a particular "Covered Action" must

---

[12] *See id*. at 10, 152.

total between 10% - 30% of the monetary sanctions collected by the SEC in that Covered Action.[13] So long as the combined awards in the aggregate fall within that range, the Commission already has discretion to determine the specific amount(s) of each individual SEC whistleblower award granted.[14] Since the SEC whistleblower program was first created, the Commission has determined the percentage amounts of awards "based on the particular facts and circumstances of each case" and not "based on any predetermined mathematical formula".[15]

For ten years, the Commission had determined those percentage award amounts during closed-door hearings. Whistleblowers and their SEC whistleblower attorneys are permitted to submit arguments and evidence in their written award applications on Forms WB-APP, which are reviewed during those closed-door hearings. However, award applicants and their counsel do not have the right to appear at those hearings or to present oral argument.[16]

As a result, to date there has been nothing to prevent the Commission from assigning to a whistleblower a percentage award figure lower than the percentage that the whistleblower may have actually deserved based on the award factors used historically or based on prior comparable award determinations. Therefore, if it were the Commission's intention to surreptitiously knock down or "cap" whistleblower awards, it could already do so by manipulating the award percentages it assigns. The Commission would not need to issue awards denominated in dollar figures to do so.

In light of the foregoing, while the Commission's pronouncement regarding dollar-denominated awards could have been premised on a desire to secretly "cap" large

---

[13] 15 U.S.C. §78u-6(b)(1).

[14] 15 U.S.C. §78u-6(c)(1)(A).

[15] SEC 2018 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 15, 2018) at 14.

[16] Whistleblowers and their attorneys can request a meeting with the SEC's Office of the Whistleblower ("OWB"), but not with the Claims Review Staff ("CRS") that makes the preliminary award determination or with the Commission when challenging a preliminary determination by the CRS. The OWB has sole discretion to grant or deny a request for a meeting with it. 17 C.F.R. §240.21F-10(e)(1)(ii); *see also* SEC 2019 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 15, 2019) at 14 ("A claimant also has 30 calendar days to request a meeting with OWB, which OWB may grant at its discretion").

awards under a different name or by a different method, as some attorneys at whistleblower law firms have posited, it is also equally possible that the guidance was issued for administrative or procedural purposes as the Commission indicated in its commentary to the amended rules.[17]

CRITICIZING THE SEC FOR LENGTHY DELAYS IN DETERMINING AWARDS AND FOR GRANTING ITS 100th AWARD

While on the one hand lauding the Commission's announcement that it had granted its 100th award, some whistleblower law firms also quietly wondered whether the timing of that announcement less than one week after the Commission voted to approve its amended rules was designed to detract media attention away from that vote. Such skepticism may be understandable given the lengthy and contentious history of these whistleblower amendments.

However, as a side consideration, for a long time whistleblower law firms have been urging the Commission to accelerate its claims determination process, which in many cases has taken several years from the date when the award applications were submitted to the date of the final award determinations. The Commission has recognized the lengthy delays and has stated (or at least implied) that it is trying to reduce the amount of time that it takes to determine award applications.[18]

The SEC's September 28, 2020 press release announced the granting of the SEC whistleblower program's milestone 100th award. The alternative to making that announcement would have been to delay the granting of that award until some later time, which begs the question of how long would have supposedly been appropriate? Moreover, holding off on announcing the 100th award would have backed-up other pending award applications and delayed the announcements of other pending awards, because the next award would have been the 100th award regardless of to whom it were issued. As it turned out, in the month following the

---

[17] *See* Final amendments to Whistleblower Program Rules at 47-49, Section II.D (Sept. 23, 2020) (Description of Final Rule Amendments, Rule 21F-6).

[18] *See, e.g.*, SEC press release, "SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program" (Sept. 23, 2020) (quoting SEC Chairman as stating, "Today's rule amendments will help us get more money into the hands of whistleblowers, and at a faster pace").

September 28 press release, the Commission granted whistleblower awards to nine more people (as of October 29, 2020).[19]

While the SEC whistleblower program's 100th award may have been fortuitous, or timed, or both, it seems a bit mercurial to criticize the Commission for granting it.

IF THE SEC TIMED ITS ANNOUNCMENT OF THE $114 MILLION AWARD, IT MAY HAVE DONE SO FOR A POSITIVE REASON

Most whistleblower law firms were happy to see the granting of the record $114 million award. However, some whistleblower law firms also questioned whether the Commission had timed that announcement for October 22, 2020, the day before the new amendments could have first gone into effect, for public relations purposes to draw attention away from those amendments and to preempt any potential rekindled media interest in them the next day.

As with the announcement of the 100th award, it is possible that the timing of the $114 million award was simply fortuitous for the Commission, or the timing could have been partially orchestrated, or both. If the SEC did time this announcement, that would not necessarily mean that it did so for the purposes described above or for any other ominous reason.

The Commission has been aware of the controversy, and even fear, that has surrounded its controversial "cap" proposal for the past two-plus years. One possibility is that, if the SEC timed the announcement of this record award, it may have done so to reassure everyone that it is not going to surreptitiously knock down or cap large whistleblower awards, and to provide at least one example that it will continue to grant large awards -- in this case an extremely large award -- where merited.

NEW INTERPRETIVE GUIDANCE REGARDING "INDEPENDENT ANALYSIS" ALSO CAUSES CONCERN FOR SOME WHISTLEBLOWER LAW FIRMS

Among other types of information, an SEC whistleblower can receive credit for providing the Commission with his or her own "independent analysis". The SEC whistleblower rules define "independent analysis" to mean a whistleblower's own

---

[19] *See* SEC Press Rel. Nos. 2020-239 (Sept. 30, 2020) (awards to 2 individuals), 2020-240 (Sept. 30, 2020) (awards to 4 individuals), 2020-255 (Oct. 15, 2020), 2020-266 (Oct. 22, 2020), and 2020-270 (Oct. 29, 2020).

"examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public".[20]

In the recent amendments to the whistleblower rules, the Commission provided new interpretive guidance as to how it intends to interpret the definition of "independent analysis". That new guidance has the potential to exclude from award consideration many whistleblowers who might previously have been award eligible.

According to the new guidance, a whistleblower's independent analysis must derive from multiple sources and, if the whistleblower's sources are publicly available, they must not be "readily identified and accessible by a member of the public without specialized knowledge, unusual effort, or substantial cost".[21] Moreover, the fraud or violation that the whistleblower is reporting to the SEC must not be "reasonably inferable by the Commission from any of the sources individually". [22]

Many whistleblower law firms are concerned about this new interpretive guidance. Even if the SEC Staff possesses certain information or documents, or that information is publicly available, that does not necessarily mean that the Staff understands it or recognizes its significance. Previously, a whistleblower could conduct his or her own analysis and formulate his or her own conclusions, and then explain that information and those conclusions, and their relevance to the underlying fraudulent conduct, to the SEC Staff. So long as the information was not already known to the Staff, and it made a meaningful contribution to the Staff's investigation of the Covered Action, the whistleblower could be eligible to receive an award.

Depending on how rigidly the SEC applies this new interpretive guidance, many previously eligible whistleblowers might be denied awards in the future. This has the potential to be especially egregious because in certain situations, if the SEC Staff does not know the information or understand its import at the time when the whistleblower reports it, that is strong *ipso facto* evidence that that information was not "reasonably inferable" at the time. Under such circumstances, it may well be undisputed that the whistleblower provided the information, and that the Staff did not know or understand it, at the time. It is highly unlikely that either the CRS or the Commission could go back in time and determine -- *as a factual matter* -- that had

---

[20] 17 C.F.R. §240.21F-4(b)(1)(i), (b)(3); 15 U.S.C. §78u-6(a)(3)(A).

[21] Final amendments to Whistleblower Program Rules at 122, Section II.P.3 (Sept. 23, 2020) (Final Interpretive Guidance).

[22] *Id*.

the whistleblower not provided his or her assistance, the Staff would have learned or figured it out on its own anyway. Years later, it is simply not possible to go back in time and un-ring that bell, as though the whistleblower had never reported his or her information in the first instance, to try to ascertain what the Staff would or would not have figured out on its own. It is this possible implication of relying upon hindsight speculation as the basis for denying awards to otherwise potentially meritorious whistleblowers that has given rise to concerns among potential whistleblowers and whistleblower law firms.

OTHER RULES AND ANNOUNCEMENTS HAVE BEEN ENCOURAGING TO WHISTLEBLOWER LAW FIRMS

Depending on the perspective, one or more of the above SEC award announcements and amendments to the SEC whistleblower rules may be either encouraging, concerning, or neutral. However, there have been a few other amendments and announcements that have whistleblowers and SEC whistleblower law firms optimistic.

One recent amendment to the SEC whistleblower rules appears designed to increase the number of award-eligible whistleblowers. Previously, a "successful action" giving rise to a possible award was defined as an administrative or court order in the Commission's favor. Non-prosecution agreements ("NPAs"), deferred prosecution agreements ("DPAs"), and settlements entered into outside of the context of a judicial or administrative proceeding did not count. The new amendments state that for purposes of the "successful action" requirement, administrative actions will include both NPAs and DPAs "entered into by the U.S. Department of Justice" or similar settlements "entered into by the Commission outside of the context of a judicial or administrative proceeding …"[23]

Another amendment[24] states that, generally speaking, for awards where the maximum 30% of the monetary sanctions collected would be $5 million or less for both the Covered Action and any related actions, and no future collections are reasonably anticipated that would cause the maximum possible award to exceed $5 million,[25] the Commission will pay a meritorious whistleblower the maximum 30%

[23] 17 C.F.R. §240.21F-4(d)(3). The requirement that the monetary sanctions collected must exceed $1 million remains the same.

[24] 17 C.F.R. §240.21F-6(c).

[25] 17 C.F.R. §240.21F-6(c)(1)(i).

award[26] provided that no "negative" factors are present.[27] In addition, the whistleblower cannot be found to have unreasonably delayed in reporting his or her information to the Commission;[28] the whistleblower's information or assistance must be more than limited;[29] it would not "be inconsistent with the public interest, the promotion of investor protection, or the objectives of the whistleblower program";[30] and the award claim cannot trigger the provisions regarding awards to culpable whistleblowers.[31]

This amendment to Rule 21F-6(c) has the potential to be game changing. According to the Commission, 74% of all whistleblower awards that it has granted to date were below $5 million.[32] Therefore, this amendment has the potential to increase the payout amount of SEC whistleblower awards for the majority of the SEC's whistleblowers. Where the requirements for this presumptive increase are satisfied, it may also decrease the amount of time that it takes to determine those awards.

In addition, on September 30, 2020, the Commission announced that during 2020 it granted a record 39 individual whistleblower awards, more than in any prior fiscal year since the SEC whistleblower program began.[33]

---

[26] 17 C.F.R. §240.21F-6(c)(2).

[27] 17 C.F.R. §240.21F-6(c)(ii); *see* 17 C.F.R. §240.21F-6(b)(1), (3) for potential negative factors.

[28] 17 C.F.R. §240.21F-6(c)(iii).

[29] 17 C.F.R. §240.21F-6(c)(iv)(a).

[30] 17 C.F.R. §240.21F-6(c)(iv)(b).

[31] 17 C.F.R. §240.21F-6(c)(ii).

[32] Final amendments to Whistleblower Program Rules at 151, Section VI.B.4 (Sept. 23, 2020) (Economic Analysis).

[33] SEC press release, "SEC Whistleblower Program Ends Record-Setting Fiscal Year With Four Additional Awards" (Sept. 30, 2020), as found on October 29, 2020 at https://www.sec.gov/news/press-release/2020-240.

CONCLUSION

Due to the history of the SEC whistleblower amendments, the original proposal that many deemed a "cap" on awards, the new interpretive guidance regarding "independent analysis", the lengthy delays in determining whistleblower award applications, and other factors, some whistleblower law firms remain cautious about the new amendments to the SEC whistleblower rules.

Other whistleblower law firms are optimistic about several of the recent rules amendments, including the new maximum award determination for awards of $5 million and under, as well as the inclusion of DPAs, NPAs, and similar settlement agreements in the definition of successful actions. These whistleblower law firms are also encouraged by the recent announcements of the record $114 million SEC whistleblower award, the record 39 whistleblower awards granted during the 2020 fiscal year, and the SEC whistleblower program exceeding 100 awards granted to date.

Either way, the recent amendments are still too new for any definitive pronouncements about what, if anything, these new whistleblower rules portend for the future of the SEC whistleblower program. More time is needed to see how the Commission interprets and applies these new amendments in practice.

*   *   *

ABOUT THE PICKHOLZ LAW OFFICES LLC

The Pickholz Law Offices LLC is a law firm that focuses on representing clients involved with investigations conducted by the U.S. Securities and Exchange Commission, FINRA, and other financial and securities regulators.

The Pickholz Law Offices has represented employees, officers, and others in SEC whistleblower cases involving financial institutions and public companies listed in the Fortune Top 10, Top 20, Top 50, Top 100, Top 500, and the Forbes Global 2000. We were the first law firm ever to win an SEC whistleblower award for a client on appeal to the full Commission in Washington, an achievement that Inside Counsel magazine named one of the five key events of the SEC whistleblower program. Examples of the Firm's SEC whistleblower cases are available on the Our Cases & Results page on our website.

In addition to representing SEC whistleblowers, since 1995 the Firm's founder, Jason R. Pickholz, has also represented many clients in financial and securities enforcement investigations conducted by the SEC, FINRA, the Commodity Futures Trading Commission, the U.S. Department of Justice and US Attorneys Offices, State authorities, and more. Examples of some of the many white collar and securities enforcement cases

that Mr. Pickholz has been involved with are available on the Our Cases & Results page on our website.

You can see what actual clients have had to say about The Pickholz Law Offices by going to the Client Reviews page on our website.

HOW TO CONTACT THE PICKHOLZ LAW OFFICES LLC

If you would like to speak with a securities lawyer or SEC whistleblower attorney, please feel free to call **Jason R. Pickholz** at **347-746-1222**.

The Pickholz Law Offices remains open and will be fully operational through teleworking while we all grapple with this terrible pandemic. We hope that all of our clients, colleagues, friends, and their families remain safe and healthy, and our thoughts and prayers go out to everyone who has been affected by COVID-19.

This publication is not and should not be construed as providing legal advice. It is not and should never be considered as a substitute for consulting with your own lawyer. The use of this publication and/or The Pickholz Law Offices LLC's web site or web page that it is published on (the "web site") does not constitute or create any attorney-client, fiduciary, or confidential relationship between The Pickholz Law Offices LLC and/or the owners/operators of The Pickholz Law Offices LLC's web site, and anyone using this publication or web site or anyone else. The information contained in this publication and/or on this web site is for informational purposes only. The content of this publication and/or this web site may not reflect current developments. Prior results do not guarantee a similar outcome. Results of prior cases or matters contained in this publication or on this web site are not indicative of future results or outcomes, and should not be taken as a prediction, promise, or guarantee of any future result or outcome. No one who accesses this publication and/or The Pickholz Law Offices LLC's web site should act or refrain from acting based on anything contained therein. For additional terms and conditions governing the use of this publication and/or this web site, please click here or on the "disclaimer" link at the bottom of The Pickholz Law Offices LLC's web site.