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SEC Proposes Expansion of Whistleblower Awards and Improvements to Claims Review Process

On June 28, 2018, the SEC [released](#) proposed changes to its Dodd-Frank whistleblower program. The program compensates individuals who report violations of federal securities laws like the Foreign Corrupt Practices Act, and protects those individuals from retaliation. While the specifics of the changes await the SEC's publication of any proposed rules, the SEC generally aims to increase its discretion to reward quality tips, clarify the definition of "whistleblower," and improve its process for reviewing whistleblower award applications. According to the release, the SEC has ordered over \$1.4 billion in disgorgement and penalties in enforcement actions originating from whistleblower referrals since 2010, when the Dodd-Frank legislation established the program.

Perhaps most significantly, the changes would allow the SEC to reward tips that result in deferred prosecution or non-prosecution agreements in federal or state criminal actions. The proposed change would also permit awards based on settlements with the SEC outside of a judicial or administrative proceeding. Conceptually, these changes would expand the number of whistleblowers eligible for an award, but questions remain such as how the SEC would fund awards based on criminal actions or avoid overcompensating whistleblowers whose tips result in both criminal and civil penalties. The SEC also proposed changes that would allow it to adjust an award up to promote tips that might otherwise not qualify for an enticing award, or down where the award would exceed an amount necessary to promote the whistleblower program's objectives. (In the latter context, the SEC noted that just three awards have accounted for forty percent of the aggregate funds it has paid to whistleblowers.)

In addition to changes that would permit more rewards for meritorious tips, the SEC proposed new rules to prevent abuse of the whistleblower program and process likely denials more efficiently. These changes would clarify the SEC's ability to bar individuals who have submitted false information and allow the SEC to bar individuals who repeatedly submit frivolous claims (the SEC has proposed a three-strike rule). Also, the changes would enable the SEC to summarily dispose of applications likely to be denied for procedural reasons, such as untimeliness or form-and-manner noncompliance, or because the investigating staff never received or used the tip. Whichever of these tools the SEC ultimately adopts, their effect on abuse and inefficiency will depend on how vigorously the SEC deploys them in practice.

Finally, the SEC proposed changing its definition of “whistleblower” to comport with the Supreme Court’s recent holding in *Digital Realty Trust, Inc. v. Somers*. There, the Court held that the Exchange Act requires whistleblowers to report to the SEC (not just

internally) to qualify for anti-retaliation protection. Our write-up on *Digital Realty* is available [here](#).

We will provide further updates when the SEC releases the text of the proposed rules.

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