

July 2017

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## *Be Careful What You Tell Your Local Regulator: SEC Provides Whistleblower Bounty to a Government Agency Employee for Investigative Tip*

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While there may be uncertainty as to the direction of the SEC's Enforcement Division under the new administration, the Commission remains steadfast in its continued promotion and support of its whistleblower program. In a novel move, the SEC recently announced that it was awarding \$2.5 million to an employee of a government agency for providing a "tip [that] helped launch an SEC investigation and [for] continued assistance [that] enabled the SEC to address a company's misconduct."<sup>1</sup> This award marks the first time that the SEC deemed a government employee eligible for a whistleblower payout, a determination which raises significant policy and practical concerns about a government employee's ability to provide to the SEC—for personal gain—information and documents, which arguably belong to another government agency.

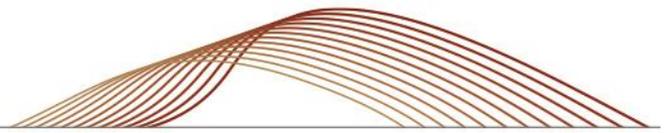
### **The Government Employee Provided the SEC with Tips, Testimony and Documents**

According to the SEC's announcement, the government employee who received the whistleblower award provided more than a simple tip of information. The SEC specifically noted that the government employee "not only helped us open the case, but also provided timely ongoing assistance along with *critical documents* and *testimony* that accelerated the pace" of the SEC's action.<sup>2</sup>

The fact that a government employee may provide documents and testimony to the SEC for personal gain raises a number of serious questions: Did the employee supply the SEC with internal documents of the government agency, or did the employee provide documents obtained through his/her official capacity? Was the government agency alerted to the fact that its employee provided information and documents to the SEC for personal gain? At what point will a government employee's quest for personal profit interfere with the employee's obligation to uphold his/her own duties and the public's trust?

### **The Whistleblower Statutory Provisions Do Not Prohibit the Award**

The SEC's whistleblower statute contains two general prohibitions against government employees receiving whistleblower awards: one relates to employees of "appropriate regulatory agencies";<sup>3</sup>



and the other relates to employees of “law enforcement organizations.”<sup>4</sup> Here, the SEC took the position that neither provision applied to this particular employee.

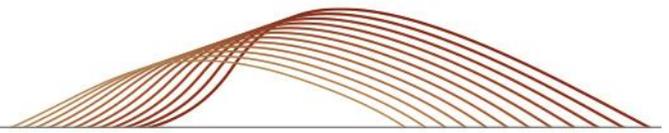
First, the SEC explained that Section 3(a)(34) of the Securities Exchange Act of 1934 defines “appropriate regulatory agency” to refer generally to the Commission and various banking regulators. Therefore, because the agency for which the employee was employed was not a banking regulator or the Commission, the prohibition against awards to “appropriate regulatory agencies” employees was irrelevant.<sup>5</sup>

Second, the SEC found that the employee was not part of a “law enforcement organization,” and thus was eligible for the bounty. Although neither the Exchange Act nor the whistleblower rules define the term “law enforcement organization,” the SEC took the position that the term refers to an organization that involves “the detection, investigation, or prosecution of potential violations of law.”<sup>6</sup> While the SEC acknowledged that certain components of the employee’s government agency would be considered law enforcement, the SEC interpreted the term “organization” narrowly such that it would not refer to a government agency that maintained both, albeit separate, law enforcement responsibilities and broader governmental functions. The fact that the SEC interpreted the term “organization” in such a way demonstrates the SEC’s willingness to provide for, and protect, its whistleblowers—especially where the plain language of the term might support a conflicting interpretation.

Separately, the SEC noted that the employee did not seek to circumvent potential responsibilities the government agency might have to investigate or otherwise take action on the misconduct. While it is important to note that the employee did not circumvent the internal governmental responsibilities, the SEC’s announcement does nothing to address whether the employee simultaneously referred the matter internally to a law enforcement division of the same government agency, which raises questions about the necessity of multiple government investigations and the ethical behavior of the employee. Moreover, the SEC’s order announcing the award is silent on the issue of whether the employee was under a separate obligation to maintain the confidential nature of the information or refrain from disclosing the information outside the scope of his/her official responsibilities. The failure to abide by such an obligation raises separate issues of civil and/or criminal liability on the part of the employee.

## **Practical Implications**

A whistleblower award of millions of dollars to a government employee is troubling and could have far-reaching implications. Government agents, under color of authority, often seek—and obtain—a plethora of confidential information from companies, either through compulsion or cooperation. Those companies and their lawyers comply with those requests, however burdensome and intrusive they may be, in part because they implicitly believe that the agents are seeking the information to satisfy their perceived government mission and not to advance some personal motives. That calculus changes, however, when the specter of the agents’ personal pecuniary gain is introduced, which naturally would cause some to question the agents’ motivations. Companies understandably may be more hesitant to voluntarily provide information to the government when the possibility exists that the government agent seeking the information has ulterior motives to profit personally from the information provided.



The notion that government employees could profit personally from their jobs beyond their regular compensation—with the possibility of millions of dollars in whistleblower awards—is antithetical to the core beliefs about the fairness and objectivity with which we expect our government agents to operate. Rewarding government agents with pots of whistleblower gold also raises disturbing concerns about potential abuse of power and corruption.

We would caution companies that are in regular contact with state, federal or local regulators to consider how, and whether, the government employees with whom they are communicating might be motivated to become whistleblowers and provide company information to the SEC. Because most information provided to the government relates in some way to a company's financial condition or public disclosures, companies must treat that information as if they are providing it to the SEC itself or even a plaintiffs' class action firm. In these circumstances, the company should seek confidentiality protection under the Freedom of Information Act, and perhaps an appropriate confidentiality order.

Companies must consider whether this motivation might cause government employees to prematurely contact the SEC with inchoate data while simultaneously obtaining additional information from the subject company under the color of the employee's official responsibilities—a factual scenario that would raise significant policy concerns for the SEC if it were to consider whether a whistleblower bounty was appropriate. If the company determines that information provided to a government agency contains evidence of potential securities violations, it should be proactive, conduct internal reviews, and self-report to the SEC if warranted. In short, companies now have to be more wary of the motives of government agents who seek confidential business information.

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<sup>1</sup> SEC Announces \$2.5 Million Whistleblower Award, Press Release No. 2017-130 (July 25, 2017), <https://www.sec.gov/news/press-release/2017-130>.

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> Exchange Act § 21F(c)(2)(A)(i), 15 U.S.C. § 78u-6(c)(2)(A)(i) (2012).

<sup>4</sup> Exchange Act § 21F(c)(2)(A)(v), 15 U.S.C. § 78u-6(c)(2)(A)(v) (2012); Exchange Act Rule 21F-8(c)(1), 17 C.F.R. § 240.21F-8(c)(1) (2017).

<sup>5</sup> *In the Matter of the Claim for Award in Connection with [Redacted] Notice of Covered Action [Redacted]*, Whistleblower Award Proceeding File No. 2017-12, Order Determining Whistleblower Award Claim (July 25, 2017), <https://www.sec.gov/rules/other/2017/34-81200.pdf>.

<sup>6</sup> *Id.* at n.2.

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