

Chair White on the SEC as Advocate of Whistleblowers and Confidentiality Agreements

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SEC Chair White [urged](#) companies that “it is past time to stop wringing our hands about whistleblowers,” announcing that whistleblowers “provide an invaluable public service” and the SEC views itself “as the whistleblower’s advocate.”

The SEC’s whistleblower program started four years ago, with the volume of tips increasing by more than 20%. The SEC received over 3,600 tips (about 10 a day) in fiscal 2014, from all states and 60 foreign countries. Most of the tips related to corporate disclosures and financial statements, offering fraud and market manipulation. Whistleblowers have not only provided the SEC with information to open new investigations, but they have also provided the staff with “insider” views on how companies approach public disclosure, highly technical analyses of fraud schemes and testimony at proceedings, and identified and encouraged additional witnesses to come forward. 80% of whistleblowers first reported their concerns internally.

Seventeen whistleblowers have received rewards totaling nearly \$50 million, with the highest single award to date of over \$30 million. The *WSJ* recently [reported](#) that the SEC has reviewed about 50 award claims, and is facing a backlog, with about 83% of whistleblowers who have applied for awards not having received a decision from the SEC.

According to Chair White, the Whistleblower Office is required to thoroughly assess every claim, even those from “serial submitters” who file claims at every opportunity although they may have no connection to the case. She stated that the Commission has been grappling with the question of the appropriate circumstances in allowing officers and directors and compliance and internal audit personnel to receive awards under exceptions to the whistleblower rules. The SEC recently awarded a former company officer who first reported fraud internally and to a compliance professional who the SEC believed had a reasonable basis to be concerned that disclosure to the SEC was necessary to prevent imminent misconduct.

Chair White also addressed the SEC’s recent focus on companies that “use [confidentiality] agreements or other mechanisms to improperly stifle whistleblowers from coming forward,” noting the KBR case which we discussed in a [client memo](#). She recognized that some have asserted that the Commission has “engaged in rulemaking by enforcement” through this case and in turn “created uncertainty as to the enforceability of all confidentiality agreements.” She emphasized that in that case, the agreement in question required pre-approval by the company’s legal department before reporting information which, in the SEC’s view, violated the plain language of the rule.

She indicated that the rule is not a “a sweeping prohibition on the use of confidentiality agreements.” Companies can continue to give the standard *Upjohn* warnings and continue to protect trade secrets and other confidential information. She warned, however, that companies need to “speak clearly in and about confidentiality provisions” so that employees understand that it is always permissible to report to the SEC. Currently, the Commission is concerned that some companies may be trying to require their employees to sign agreements mandating that they forego 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.

Finally, Chair White emphasized that the SEC wants to foster “a safe environment” for whistleblowers from both retaliations as well as efforts that could chill the willingness of employees to report to the SEC, including any non-disclosure or other confidentiality agreements that could imply that such reporting is not allowed.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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