LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin®

An ALM Publication

Volume 28, Number 10 • June 2021

Developments In Federal Whistleblowing Programs: What Compliance Officers Need to Know

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Amidst the COVID-19 pandemic, federal whistleblower programs continue to receive thousands of tips and issue millions in awards. The Securities and Exchange Commission's (SEC) whistleblower program remains very active and over the past year, has awarded its highest whistleblower awards ever. A new Chairman and recent rule changes may lead to even more activity under the SEC's program. The Commodity Futures Trading Commission's (CFTC) whistleblower program, while not as extensive as the SEC's program, may see an uptick in activity if recent proposed legislation is passed. The government's False Claims Act (FCA) enforcement continues to be driven by whistleblower reports and COVID-19 related fraud may lead to substantial increases in FCA tips going forward.

In addition, Congress recently repealed and replaced a prior whistleblower program under the Bank Secrecy Act (BSA) that was largely seen as unsuccessful. Congress also passed the Kleptocracy Asset Recovery Rewards Act (KARRA) to fill a perceived gap in the SEC whistleblower program by specifically encouraging whistleblowers who provide information related to foreign government corruption.

This article examines recent developments and trends concerning these federal whistleblower programs that compliance officers need to know and provides best practices recommendations for ensuring that your company maintains a robust whistleblower and anti-retaliation program in light of this increased whistleblower activity.

SEC Whistleblower Program

With a new Chairman focused on robust enforcement, it is likely that the SEC will continue to bolster and promote its whistleblower program. In his responses to questions from Senator Chuck Grassley ahead of his confirmation hearing, SEC Chairman Gary Gensler stated that he wants to "examine whether and how the [SEC's whistleblower] program could be strengthened to ensure that misconduct within the remit of the SEC is identified, addressed and stopped." (*See*, https://bit.ly/3ysvqEM.)

According to the SEC's 2020 Annual Report to Congress, since 2010, its whistleblower program has provided $562 million in total awards to 106 individuals. (*See*, https://bit.ly/3u4fOUv.) FY 2020 was a record year — the program paid out approximately $175 million to 39 individuals, triple the number of individuals who were given awards in 2018. The program received over 6,900 whistleblower tips, a 31% increase from fiscal year 2018, the second highest tip year. In FY 2021, the SEC has awarded approximately $339 million to whistleblowers, already outpacing FY 2020 and bringing the total awards to more than $900 million over the life of the program. Indeed, in October 2020, the SEC awarded $114 million to an individual, the largest whistleblower amount in program history. (*See*, https://bit.ly/3oAH7os.) In May 2021 alone, the SEC has awarded almost $85 million to nine individuals. (*See*, https://bit.ly/2T5tmCh.) The increasingly large awards given to individuals serve as strong incentives for reporting suspected violations of the securities laws.

The SEC's whistleblower program recently underwent some key changes that may lead to even more tips. Effective on Dec. 7, 2020, the SEC adopted amendments to its whistleblower rules "to provide greater clarity to whistleblowers and [to] increase[] the program's efficiency and transparency." (*See*, https://bit.ly/33YhTXx.)

In one key change, the rules now provide a presumption of the statutory maximum amount for awards of $5 million or less. Historically, an applicant was entitled to between 10% and 30% of monetary sanctions over $1 million collected by the SEC in actions it brought based on that whistleblower's information. The percentage awarded depended on various factors set out in the rules.

In another key change, a whistleblower may be eligible for an award if a matter is resolved by a criminal deferred prosecution or non-prosecution agreement with the Department of Justice (DOJ), or by a similar settlement agreement with the SEC. *Id*. at Rule 21F-4(d).

The SEC also changed the definition of "whistleblower" to comply with the

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Supreme Court's decision in *Digital Realty Trust v. Somers*, 138 S.Ct. 767 (2018). The Supreme Court held in *Digital Realty* that a person had to report a securities violation to the SEC, as opposed to internally, in order to be protected by applicable anti-retaliation provisions. Under the SEC's rule amendments, an individual must now submit a report to the SEC in writing prior to experiencing any retaliation to qualify as a protected whistleblower.

CFTC Whistleblower Program

Recent developments indicate that the CFTC's whistleblower program might become more active. CFTC whistleblowers are entitled to between 10% and 30% of funds recovered in an action brought by the CFTC. Since its inception, the program has grown exponentially; in the program's first full year the CFTC received 110 complaints (*see*, *https://bit.ly/3owi3ij*) compared to over 1,000 complaints in FY 2020 (*see*, https://bit.ly/3ovdmoU). Recently, on April 23, 2021, the CFTC announced an approximately $3 million whistleblower award. (*See*, https://bit.ly/3v55CfM.)

The biggest challenge facing the CFTC's whistleblower program is the risk that its Consumer Protection Fund (the Fund), which funds its whistleblower awards, operating expenses, and educational initiatives, will be depleted. When Congress established the program in 2014, it placed a $100 million cap on the Fund. Any fines collected above $100 million are sent to the Treasury's general fund. In February 2021, Senator Grassley stated that because the risk of a cash shortage is so great, the CFTC informed his office that it had temporarily paused review of some cases that could wipe out the Fund used to pay whistleblowers. (*See*, *https://bit.ly/3vhX0CN*.) He and three other senators have proposed legislation — the CFTC Fund Management Act — that would raise the cap to $150 million and temporarily create a separate account to fund operating and programming expenses.

The FCA Whistleblower Program

In FY 2020, the DOJ recovered more than $2.2 billion in FCA actions, with $1.6 billion of that attributable to cases that arose through whistleblowers. (*See*, *https://bit.ly/2S59i2t*.) FCA whistleblower activity is expected to become even more active as the government continues to address COVID-19 relief fraud.

Under the FCA, whistleblowers, known as relators, can file lawsuits on behalf of the U.S. government against individuals and entities accused of misconduct. If the government intervenes and is granted monetary relief in the suit, the relator is entitled to a portion of those penalties. 31 U.S.C. §3730(d). Various COVID-19-related stimulus packages that have passed since the onset of the pandemic have made available trillions of dollars of economic aid to people and entities impacted by the pandemic. In the aftermath of Hurricane Katrina and the 2008 financial crisis, the federal government heavily utilized its FCA enforcement powers to prosecute misuse of the federal funding distributed in response to those national emergencies. The COVID-19 relief funding dwarfs those previous stimulus packages. We can, therefore, expect a significant increase in FCA whistleblower activity related to COVID-19 relief fraud in the coming years. Indeed, the DOJ has stated that FCA "whistleblower complaints have been on the rise as unscrupulous actors take advantage of vulnerabilities created by the COVID-19 pandemic and the new government programs disbursing federal relief, and whistleblower cases will continue to be an essential source of new leads to help root out the misuse and abuse of taxpayer funds." (*See*, https://bit.ly/2SclAWY.)

New Whistleblower Programs Under the National Defense Authorization Act for Fiscal Year 2021

On Jan. 1, 2021, Congress passed the National Defense Authorization Act for Fiscal Year 2021 (NDAA), which created two new whistleblower programs administered by the Treasury Secretary. The Anti-Money Laundering Act of 2020 (AMLA), passed within the NDAA, established a new whistleblower program for individuals who provide information relating to money laundering or BSA violations. KARRA, also passed within the NDAA, awards whistleblowers for providing information that leads to the repatriation, restraint, forfeiture, or seizure of stolen assets specifically linked to foreign government corruption and the proceeds of such corruption. While both programs are in their beginning stages and await implementing regulations, they have the potential to lead to more whistleblower tips in these areas.

The AMLA Whistleblower Program

Under the AMLA whistleblower program, individuals who provide original information to their employer, the Treasury Secretary, or the Attorney General that leads to a successful BSA enforcement action resulting in monetary sanctions over $1 million may qualify for an award of up to 30% of the monetary sanction imposed. 31 U.S.C. §5323(b). The program represents a significant overhaul of the prior whistleblower program under the BSA, which capped awards at $150,000 and generally was seen as ineffective.

While the AMLA whistleblower program was partly modeled on the SEC program, there are some key differences between the programs that might impact the amount of activity under the AMLA program. For one, rewards under the AMLA program are funded from appropriations by Congress as opposed to funded by penalties paid by wrongdoers. *Id*. at §5323(b)(1), (2). Therefore, payments to whistleblowers are only available if Congress appropriates sufficient funding. In addition, unlike the SEC's whistleblower program, the Treasury Secretary is not required to make any minimum award. *Id*. Moreover, the AMLA's program does not base awards on restitution, forfeiture, or victim compensation payments, *id*. at §5323(a)(2), which comprise large portions of recoveries in many anti-money laundering prosecutions. This is a significant difference from the SEC's whistleblower program, which contains no exclusions regarding remedies eligible for a reward.

The AMLA's whistleblower program also has a key gap in its anti-retaliation provisions. While the program prohibits retaliation against whistleblowers, it includes a carve-out for any employer that is subject to the whistleblower provisions of the Federal Deposit Insurance Act or the Federal Credit Union Act. *Id*. at §5323(g). Employees at these institutions,

where many of the whistleblower complaints related to money laundering would originate, will have fairly weak protections against retaliation.

However, certain components of the AMLA's whistleblower program might make it more attractive for potential whistleblowers. Unlike the SEC's whistleblower program, certain employees who report conduct while "acting in the normal course of the job duties" may qualify as whistleblowers under the AMLA program. *Id*. at §5323(a)(5). This may broaden the pool of potential whistleblowers to include, among others, compliance officers, who cannot qualify as whistleblowers under the SEC's program. In addition, the AMLA program's anti-retaliation protections extend to whistleblowers who report misconduct either internally or to a government agency. *Id*. at §5323(g). In comparison, as noted above, the anti-retaliation provisions of the SEC's whistleblower program do not protect whistleblowers who report internally only.

It is too early to tell whether the new AMLA whistleblower program will significantly increase whistleblower activity. The success of the program in large part may depend on the regulations that the Treasury has yet to implement.

KARRA Whistleblower Program

KARRA creates a three-year whistleblower pilot program administered by the Treasury Secretary aimed at recovering "stolen assets" linked to foreign government corruption. "Stolen assets" are defined as funds traceable, directly or indirectly, to foreign government corruption that are held at U.S. financial institutions and found in the U.S. or in the possession of U.S. persons. 31 U.S.C. §9706(h)(8). Under the program, the Treasury Secretary is authorized to award up to $5 million to any individual who provides information leading to the restraint, seizure, forfeiture, or repatriation of stolen assets. *Id*. at §9706(b)(1)-(3), (e)(2). This is a seemingly less stringent standard than other whistleblower programs, because it apparently does not require a successful enforcement action or resolution.

However, the KARRA program also has limitations that might depress whistleblower activity. For example, similar to the AMLA program, the amount of an award is left to the sole discretion of the Treasury Secretary and there is no minimum award requirement. *Id*. at §9706 (b). Also, an individual is not eligible to receive an award if they participated in the unlawful conduct. *Id*. at § 9706(f)(2). In contrast, under the SEC program, an individual with "unclean hands" is eligible to receive a whistleblower award. The program is also capped at $25 million per year, *id*. at §9706(b), (d)(2), which may lead to issues similar to those experienced by the CFTC's program. Notably, the KARRA program does not include any confidentiality or anti-retaliation provisions.

On the other hand, the KARRA program fills in a gap of the SEC program. Under the SEC's program, individuals are typically only rewarded for information related to bribes paid to foreign officials because of limitations in the FCPA. Because KARRA focuses on money and property corruptly obtained by foreign officials or others, it allows individuals to receive awards for information related to the receipt of bribes.

Although KARRA lays out a framework for its whistleblower program, many questions remain, including how award amounts will be determined and what it means for information to "lead to" the detention of "stolen assets." At first glance, this standard appears lower than the SEC program's "original information" requirement. It may also allow the Treasury Secretary to authorize awards based on the "restraint" or "seizure" of stolen funds, which can be temporary in nature. However, forfeiture proceedings can become tied up in years-long litigation and an award may not be made until the litigation is ultimately resolved. We will not know whether KARRA will lead to significantly increased whistleblower activity until these questions are resolved.

Key Takeaways for Compliance Officers

The federal whistleblower programs remain heavily utilized. It appears that the SEC, CFTC, and FCA whistleblower programs will continue to expand. The AMLA and KARRA whistleblower programs have the potential of adding to the already active whistleblower environment. In light of these recent trends and developments, now is an appropriate time for compliance officers to review their companies' whistleblower and anti-retaliation policies to ensure that they are sufficiently robust, proactive, and resourced. Key items to consider include:

- ***Ensuring that the company fosters a culture of internal reporting.*** The company's whistleblower and anti-retaliation policies should be clearly communicated to all company employees and appropriate training should be implemented. Whistleblower policies and procedures should include the ability for employees to make reports anonymously and with adequate confidentiality safeguards. Strongly encouraging employees to report allegations of misconduct internally could enable the company to get a handle on any potential misconduct in advance of a government investigation.
- ***Ensuring that the company's internal policies for addressing whistleblower reports and retaliation allegations are well-defined.*** Companies should have an established process for complaint intake and determining how the complaint will be diligently investigated. The policies should also delineate how investigations are completed, how investigation results are reported, and how to determine appropriate remediation.

Compliance officers can try to stay ahead of the federal government's expanding whistleblower programs by keeping their companies' whistleblower and anti-retaliation policies and procedures robust and up-to-date.

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