

Internal Investigations Reduce the Dread



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Speakers

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The 9/9/15 Yates Memorandum: DOJ's Efforts to Ratchet Up Individual Accountability for Corporate Wrongdoing: "Six Key Steps"

- Corporations will be eligible for cooperation credit only if they provide DOJ with "all relevant facts" relating to all individuals responsible for misconduct, regardless of the level of seniority;
- Both criminal and civil DOJ investigations should focus on investigating individuals "from the inception of the investigation;"
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- "Absent extraordinary circumstances," DOJ should not agree to a corporate resolution that provides immunity to potentially culpable individuals;
- DOJ should have a "clear plan" to resolve open investigations of individuals when the case against the corporation is resolved; and
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**TOTAL
WHISTLEBLOWER
AWARDS OVER
\$54,000,000**

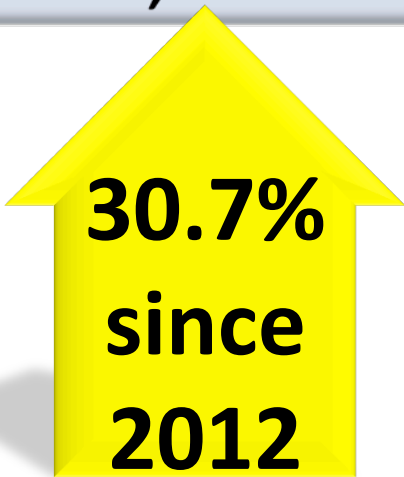


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Whistleblower Complaints Received by the SEC

2012	2013	2014	2015
3,001	3,238	3,620	3,923



30.7%
since
2012

Source: U.S. Securities and Exchange Commission: Annual Report on the Dodd-Frank Whistleblower Program – Fiscal Year 2015 (<http://www.sec.gov/about/offices/owb/annual-report-2015.pdf>)

Profile of Whistleblower Award Recipients

- Almost 50% of award recipients were current and former employees
- The rest: Company contractors or consultants, investors, professionals in same industry, personal relationships with defendants

SEC Whistleblower Awards as of April 11, 2016

By Christian R. Bartholomew, Jenner & Block, edited by Mike Delikat and Renee Phillips, Orrick

DATE	NUMBER OF CLAIMANTS	AMOUNT AWARDED	% of SANCTIONS AWARDED	WB INFO	NOTES
8/21/2012	1 Claimant	\$200,000	30%	Outside Consultant (per WSJ)	According to SEC press release, WB provided “the exact kind of information and cooperation [the SEC was] hoping the whistleblower program would attract.” WSJ later reported that WB was an outside consultant. First payout was for \$50,000; second payout was on April 2014 for \$150,000.
6/12/2013	3 Claimants	\$125,000	15% (5% to each Claimant)	No information	Per SEC press release, three WBs will receive 15% of \$875,000, aggregate value of assets seized in the Locust Offshore Mgmt. sham hedge fund case, including sanctions recovered in a related criminal action.
9/30/2013	1 Claimant	More than \$14 million	Unknown	No information	SEC did not provide percentage amount of award but WSJ reported that award was related to scheme to defraud foreign investors seeking U.S. residency (SEC v. A Chicago Convention Center, LLC, et al.) in which \$147M was returned to investors.
10/30/2013	1 Claimant	More than \$150,000	30%	No information	SEC press release stated that WB “provided significant information that allowed the SEC to quickly open an investigation and obtain emergency relief before additional investors were harmed.”
6/3/2014	2 Claimants	\$875,000	30% (split)	No information	SEC press release indicated that WB provided information enabling SEC to bring “a successful enforcement action in a complex area of the securities market.”
7/22/2014	3 Claimants	Unknown	30%	No information	Award split 15%, 10%, and 5%; no SEC press release or articles.
7/31/2014	1 Claimant	More than \$400,000	Unknown	No information	WB’s claim was initially denied because had not come forward “voluntarily” in light of prior SRO inquiry; SEC reversed itself, determining that the whistleblower reported matter internally and “did everything feasible to correct the issue.”
8/29/2014	1 Claimant	More than \$300,000	20%	Audit/ Compliance professional	First award to an audit and compliance professional; head of SEC WB Office Sean McKessy: internal audit, compliance, and legal personnel are “on the front lines in the battle against fraud and corruption. . .these individuals may be eligible for an SEC whistleblower award if their companies fail to take appropriate, timely action on action information they first reported internally.”
9/22/2014	1 Claimant	Between \$30-35 million	Unknown	Foreign Whistleblower	Largest award to date and fourth award to a foreign whistleblower; McKessy: “Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws.”

SEC Whistleblower Awards as of April 11, 2016

DATE	NUMBER OF CLAIMANTS	AMOUNT AWARDED	% of SANCTIONS AWARDED	WB INFO	NOTES
3/2/2015	1 Claimant	Between \$475,000-\$575,000	Unknown	Officer	SEC press release: "Officers, directors, trustees, or partners who learn about a fraud through another employee reporting the misconduct generally aren't eligible for an award under the SEC's whistleblower program. However, there is an exception to this exclusion that makes an officer eligible if he or she reports the information to the SEC more than 120 days after other responsible compliance personnel possessed the information and failed to adequately address the issue. This is the first SEC whistleblower award to an officer under these circumstances."
4/22/2015	1 Claimant	Between \$1.4-\$1.6 million	Unknown	Compliance Officer	SEC press release: "[t]he award involves a compliance officer who had a reasonable basis to believe that disclosure to the SEC was necessary to prevent imminent misconduct from causing substantial financial harm to the company or investors."
4/28/2015	1 Claimant	More than \$600,000	30%	Whistleblower in Paradigm case	Award to WB in first retaliation case (See In the matter of Paradigm Capital Mgmt. and Candance King Weir, File No. 3-15930).
7/17/2015	1 Claimant	More than \$3 million	Unknown	Company insider	Third highest award to date; SEC press release stated that WB is "a company insider whose information helped the SEC crack a complex fraud."
9/28/2015	2 Claimants	Unknown	20% (11% to Claimant 1 and 9% to Claimant 2)	Foreign Nationals	No press release. The 2015 SEC Whistleblower Report noted that the whistleblowers are foreign nationals "who jointly reported information that caused Enforcement staff to open the investigation in the underlying action."
9/29/2015	1 Claimant	Unknown	28%	Unknown	No press release. The 2015 SEC Whistleblower Report noted that this is a near maximum award to a whistleblower "who voluntarily provided original information to the agency that led to the successful enforcement of the underlying covered action."
11/4/2015	1 Claimant	More than \$325,000	Unknown	Former company insider	Award to a former investment firm employee who reported the fraudulent activity after leaving the company. SEC release noted that the award could have been higher had the WB not delayed in reporting.
1/15/2016	1 Claimant	More than \$700,000	Unknown	Company outsider	WB described in press release as a company outsider "who conducted a detailed analysis that led to a successful SEC enforcement action." Director of Enforcement Ceresney: "high-quality analysis by industry experts can be every bit as valuable as first-hand knowledge of wrongdoing by company insiders."
4/5/2016	1 Claimant	More than \$275,000	Unknown	Unknown	WB to collect percentage of monetary sanctions in Covered Action and Related Criminal Action, subject to "an offset for any monetary obligations (including disgorgement, prejudgment interest, and penalty amounts)" that remain unpaid from the Final Judgment entered against the WB.
Totals	24 WBs in 18 cases	More than \$55,000,000			



PRESS RELEASE

SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements

Agency Announces First Whistleblower Protection Case Involving Restrictive Language

FOR IMMEDIATE RELEASE
2015-54

Washington D.C., April 1, 2015 — The Securities and Exchange Commission today announced its first enforcement action against a company for using improperly restrictive language in confidentiality agreements with the potential to stifle the whistleblowing process.

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The SEC charged Houston-based global technology and engineering firm KBR Inc. with violating whistleblower protection Rule 21F-17 enacted under the Dodd-Frank Act. KBR required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. Since these investigations included allegations of possible securities law violations, the SEC found that these terms violated Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC.

KBR agreed to pay a \$130,000 penalty to settle the SEC's charges and the company voluntarily amended its confidentiality statement by adding language making clear that employees are free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation.

"By requiring its employees and former employees to sign confidentiality agreements imposing pre-notification requirements before contacting the SEC, KBR potentially discouraged employees from reporting securities violations to us," said Andrew J. Ceresney, Director of the SEC's Division of Enforcement. "SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision."

SEC's Confidentiality Concerns

Possible Carve Out Language:

- I acknowledge that nothing in this Agreement prohibits or restricts me from initiating communications directly with, responding to any inquiry from, or providing information to or testimony before, the Securities and Exchange Commission (“SEC”), Department of Justice (“DOJ”), Financial Industry Regulatory Authority (“FINRA”), or any other governmental agency or self-regulatory organization, about actual or potential violations of laws or regulations. I acknowledge that am not required to obtain the company’s prior authorization before engaging in such communications, nor am I required to inform the company about such communications.

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Cybersecurity Whistleblowers

SEC Priorities

1. Whistleblowing



2. Cybersecurity



Cybersecurity Whistleblowers Currently Seeking Bounties

Failure to Disclose Cyber Risks/Incidents to Shareholders

- Materiality

Failure to Adopt Adequate Internal Controls

- Broker Dealers and Investment Advisors: Protecting Client PII
- Public Companies: Ensure Accurate Financial Statements under SOX 404.
- Retaliation: Employee doesn't have to Report Actual Violation— Just Reasonable Belief!

Cybersecurity Whistleblower Risks



Perfection is impossible



Employees may not be happy if their recommendations are not adopted



Managers may not want to hear about legitimate issues that are too difficult or costly



Boards may not be sufficiently up to speed



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“Nuts & Bolts”



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Planning and Investigation

- The investigative plan
- Educating the team
- Lines of authority and reporting
- Joint defense agreements
- Communication and teamwork



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Who May be Interviewed

- Ensure ex parte interviews are permitted in the jurisdictions where the current or former employee is located.
- Investigators may not seek or obtain privileged information from any current or former employee.
- Investigators may not interview any such person who is represented by an attorney.
- Give investigators model guidelines to take into field.

Practical Considerations

- Where should the interview be conducted?
- Who should conduct the interview?
- How many interviewers should be present?
- Retaining versus discarding notes
- Decide whether to obtain sworn statements or affidavits from witnesses
- Recording
- Who may be present for interviewee

Demands for Payment and Other Requests

- No legal prohibitions barring these payments
- Expert witnesses may receive payment if amount is reasonable and not contingent on the trial's outcome
- Non-expert witnesses can be compensated for lost income and opportunity cost of testifying
- Consider witnesses credibility

Privileged and Confidential

- Sometimes



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Who Do You Represent?

- Preamble
- Confusion will be disastrous
- *UpJohn*
- “Do I need a lawyer?”
- “What if I don’t want to be interviewed?”

Reports

- Attorney-client privilege issues
- Defamation/libel
- Privacy



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