

CLIENT ALERT

SEC Announces Plans to Review Two Trump-Era Whistleblower Rule Changes

Aug.06.2021

On Monday, August 2, the Securities and Exchange Commission (SEC) announced that it will review two amendments to the SEC's whistleblower program rules that were adopted in September 2020.

Established by Congress as part of the Dodd-Frank Act, the SEC's whistleblower award program allows the SEC to reward whistleblowers who provide information to the SEC about a violation of federal securities laws that leads to a successful enforcement action. SEC Chairman Gary Gensler has stated that the program "helps us to be better cops on the beat, execute our mission, and protect investors from misconduct." Since the program's inception, whistleblowers have assisted the SEC in obtaining over \$3.5 billion in financial remedies. The SEC reported in April 2021 that it issued an award of over \$50 million to joint whistleblowers—the second largest reward in the history of the program, following the largest award of \$114 million in October 2020.

In September 2020, a divided Commission voted to amend various portions of the rules implementing the whistleblower program. Among those changes are the two changes that, as of August 2, are now targeted by Chairman Gary Gensler for revision.

The first change modified the definition of "related action." Recall that the Commission will issue an award to a whistleblower who voluntarily provides original information that contributes to an enforcement action and recovery brought by the SEC or in certain other "related actions" in excess of \$1,000,000. Following the amendment, "related actions" do not include situations in which a separate whistleblower program has a "more direct or relevant connection to the action" or if the whistleblower has already been granted an award by another governmental entity.

The second and more controversial change was to the criteria that the SEC uses to determine the amount of an award. The SEC considers a series of factors that can increase or decrease the amount of a whistleblower's award, including unreasonable reporting delay, law enforcement interest, and the significance of the information provided. The changes last September included in these factors the total amount of the award. Chairman Gensler's August 2 statement shares a concern that was voiced by many when the changes were first proposed—that these factors and the discretion provided to the SEC could "be used by a future Commission to lower an award because of the size of the award."

Chairman Gensler explained that the SEC will prepare revisions to these two rules, to be released later this year, to address the concern that they "discourage whistleblowers from coming forward." Chairman Gensler added that potential revisions include: (1) permitting the SEC to make awards for "related actions that might otherwise be covered by an alternative whistleblower program that is not comparable to the SEC's own program"; and (2) clarifying that despite the Commission's discretion in making awards, the Commission will not lower an award based only on its dollar amount.

The Chairman's decision to consider revising these rules comes on the heels of a lawsuit challenging their lawfulness. Filed in January 2021, the suit alleged that the amendments reverse the SEC's previous rules and interpretations related to

whistleblower awards without sufficient justification, making their adoption arbitrary and capricious. The complaint centers on the concern that the rules “disincentivize knowledgeable individuals from coming forward and blowing the whistle.”

Crowell & Moring will continue to monitor the SEC’s changes to its whistleblower program and provide updates.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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