



U.S. Record Breaking Awards and a New FinCEN Whistleblower

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The U.S. Securities and Exchange Commission (**SEC**) recently awarded approximately \$36 million to a whistleblower who was culpable in the wrongful conduct and delayed reporting information to the agency for five years. The award is among the Top 10 awards ever issued by the SEC. Nor is the SEC alone in pushing the limits of whistleblower awards: the U.S. Commodity Futures Trading Commission (**CFTC**) recently issued its largest award ever—a \$200 million payment—which was also awarded to an imperfect whistleblower. These recent awards break new ground and should spur companies to update their internal compliance programs. Companies should also keep an eye on the nascent Department of Treasury's Financial Crimes Enforcement Network (FinCEN) whistleblower program, which is still being fleshed out and will resemble the programs under the SEC and CFTC—but perhaps with some key differences.

SEC Pays Whistleblower \$36 Million Despite Culpability and Unreasonable Delay—Recent Payments from the SEC and CFTC Break New Ground

The SEC recently **awarded** approximately \$36 million to a whistleblower who was culpable in the wrongful conduct and delayed reporting information to the agency for five years. Even with a reduction applied for the whistleblower's culpability, this award is so large that it falls within the **Top 10** awards ever issued by the SEC. And the SEC is not alone in pushing the limits of whistleblower awards. The CFTC recently **issued** its largest award ever—\$200 million, also to an imperfect whistleblower—blazing past its prior **record** of \$30 million.

As agencies appear to issue whistleblower awards with increasing liberality, and given that over 80 percent of award recipients already raised their concerns internally before reporting them to a government agency, companies should ensure that all of their internal reporting channels are comprehensive and effective in order to catch potential compliance concerns early on.

SEC Whistleblower Program: A Dramatic Upward Trend

The SEC issues whistleblower awards under a program created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").¹ Whistleblowers, in exchange for

¹ Dodd-Frank amended the Securities Exchange Act of 1934 by, among other things, adopting Section 21F, "Securities Whistleblower Incentives and Protection," codified at 15 U.S.C. § 78u-6.

relevant and helpful information about potential securities law violations, are granted protections by Dodd-Frank and the SEC's Whistleblower Rules.²

Of the Top 10 awards issued by the SEC, *four* have come in 2021 alone,³ which have contributed to the more than **\$500 million** in awards issued in FY 2021—dwarfing the total amount of awards issued in FY 2020. These recent increases are part of a larger trend: the award amounts and number of whistleblower awards have trended upward since the program became effective in 2011, with 2020 starting a dramatic upward **spike**.

Most whistleblowers are current or former insiders of the entity about which they reported information of wrongdoing. Shockingly, *over 80 percent of recipients who were former insiders of the reported entity had already raised their concerns internally* before reporting them to a government agency.⁴

Whistleblower Culpability: A New Development?

While the increase in whistleblower awards is striking in itself, another development should catch the attention of the business community. The whistleblower mentioned above who was both “culpable in the underlying scheme” and who “unreasonably delayed reporting” to the SEC for five years received \$36 million—one of the largest awards issued this year and a Top 10 award in the program’s history.

The accompanying **order** states that the whistleblower provided “original information” and “significantly contribut[ed] to the success” of an investigation against a financial institution. But this massive payout actually reflects a lower amount than the whistleblower would have otherwise been entitled to because the SEC reduced⁵ the percentage of the monetary sanctions awarded to the whistleblower in light of the fact that the whistleblower was culpable and unreasonably delayed reporting.⁶

It is rare for an award of such an amount to be given to a whistleblower whom the SEC publicly acknowledges was culpable in the wrongdoing. *None* of the SEC’s Top 10 awards—except for this one—has been awarded to a culpable whistleblower, at least as described in the public award orders. Moreover, in FY 2020, no award amounts were reduced for culpability.⁷ While it is not uncommon for awards to be reduced for an unreasonable reporting delay,⁸ in FY 2020, only two awards were reduced for this reason, each involving delays of multiple years.⁹

² 17 C.F.R. §§ 240.21F-1 through 21F-17.

³ (1) April 15, 2021: \$50 million; (2) September 15, 2021: \$110 million; (3) September 24, 2021: \$36 million; and (4) October 15, 2021: \$32 million.

⁴ https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

⁵ We do not know the percentage by which the award amount was reduced due to the SEC’s redaction of award percentages in all public award orders. <https://www.sec.gov/rules/other/2021/34-93118.pdf>.

⁶ Whistleblower award percentages can be reduced because of culpability and unreasonable delay in reporting under Rule 21F-6(b).

⁷ https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

⁸ Four of the Top 10 awards report unreasonable delay by the whistleblower and apparently reduce their award percentages accordingly, though sometimes with factors mitigating the negative delay. For all awards, the most common negative factor in determining award percentages is unreasonable delay. <https://www.sec.gov/files/owb-award-determination-guidance2.pdf>.

⁹ https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

In short, this award is one of a kind.

Recent CFTC Award Also Breaks New Ground

The CFTC also administers a whistleblower award program that originated in the Dodd-Frank reforms.¹⁰ Since the program's inception, the CFTC has issued 31 award orders, totaling more than \$123 million. So, while operating on a smaller scale than the SEC, the CFTC program provides a significant outlay of awards.

The CFTC took a dramatic step with its whistleblower program in October 2021, when the agency **issued** its largest publicly announced award ever: *\$200 million*. That award is more than one-and-a-half times larger than *all previous CFTC awards combined* and is larger than any single SEC award. According to the CFTC's public **order**, the whistleblower, who **worked** at a major financial institution, provided information that the company had a large trading position at issue, which was deemed to be a "significant contribution" under the CFTC whistleblower program.¹¹ The **award** was based on both a percentage of an action brought by a U.S. federal regulator and also on a percentage of an action brought by a foreign regulator.

Surprisingly, the Claims Review Staff (CRS) of the CFTC initially recommended that the Commission *deny* the whistleblower's claim due to a lack of sufficient information showing that the claimant led to the successful enforcement. Moreover, the award was apparently lessened in light of a number of negative factors,¹² including that the claimant "did not provide direct evidence, but instead provided information that led to direct evidence"; the significance of the assistance "was not readily obvious"; the information "related to only some of the misconduct"; and the claimant delayed reporting the information.¹³

The presence of these negative factors in the recent CFTC award invites a comparison to the SEC's September 24, 2021 award described above. Both awards were issued despite negative factors that could have weighed against issuing them in the first place or further reducing the award percentage granted. It is remarkable that, in spite of the negative factors described, each of these award amounts was so significant—an indication of (1) how large the monetary sanctions in the related actions must have been or are expected to be and (2) how important the actions are to the agencies' priorities.

FinCEN Whistleblower Program

In comparison to the SEC and CFTC programs, it will be interesting to see how the forthcoming whistleblower program from FinCEN develops. While it is early days and FinCEN has not yet issued proposed rules, under the Anti-Money Laundering Act of 2020 (AMLA), an eligible whistleblower reporting an anti-money laundering violation, which violation leads to monetary penalties exceeding \$1 million, may receive an award of up to 30% of the funds collected. In theory, unlike SEC and CFTC whistleblowers, a FinCEN whistleblower could receive no award,

¹⁰ See Section 23, 7 U.S.C. § 26 (2018). The program is detailed in regulations. 17 C.F.R. pt. 165 (2020).

¹¹ 17 C.F.R. § 165.2(i).

¹² The CFTC whistleblower award program has a set of factors similar to the SEC's, both for increasing and decreasing award percentages. See 17 C.F.R. § 165.9.

¹³ <https://www.whistleblower.gov/sites/whistleblower/files/2021-10/No.%202021-WB-07.pdf>.

but there has been at least one proposal in Congress to amend the AMLA to provide for an award minimum. With regard to culpability, the AMLA lists *only* positive factors that the Secretary of the Treasury may consider in determining award amounts, such as the significance of the information provided, but does not list negative factors, such as the whistleblower's participation in the crime. And unlike the SEC program, which excludes whistleblower information obtained in the ordinary course of duty by an employee principally involved in compliance or internal audit, an individual is an eligible whistleblower under the AMLA even when reporting violations discovered in the course of the individual's job duties.

Conclusion

The incentives provided by the whistleblower programs administered by the SEC and CFTC continue to increase as larger and larger payouts become the norm. This past year has seen unprecedented award amounts from both agencies—a clear invitation to any would-be whistleblower. Additionally, both agencies have been willing to overlook negative factors in disclosure (e.g., culpability of the whistleblower and unreasonable delay in reporting to the agency) while nonetheless issuing massive awards pursuant to their programs. On the heels of these programs, FinCEN is now developing rules for a whistleblower program, and there is a possibility that Congress may provide for an award *minimum*, which may provide yet another set of incentives to report wrongdoing externally.

The SEC and CFTC's recent jaw-dropping awards—and FinCEN's developing program—are an excellent reminder of why it is so important for companies to have comprehensive and effective internal whistleblowing channels. As mentioned above, *over 80 percent* of whistleblower award recipients who were former insiders had already raised their concerns internally (or understood that their supervisors or compliance personnel knew of the violations). That figure alone should spur any company to make sure that it has a well-functioning internal whistleblower program, which will allow it to identify and remediate any compliance concerns early on.