



SEC Waives Voluntary Requirement in Making Whistle-Blower Award

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By Allen Smith

The U.S. Securities and Exchange Commission (SEC) is taking an aggressive stance with whistle-blower awards under the Dodd-Frank Act, waiving the requirement that the information be voluntarily provided in order to make a July 31, 2014, award of \$400,000 to a whistle-blower.

The agency is “willing to ignore its own regulations” with respect to disclosures being voluntary to merit an award, said Lloyd Chinn, an attorney with Proskauer, in an interview with *SHRM Online*.

Although the SEC cannot disclose any information that might reveal a whistle-blower’s identity, it is clear here that a regulatory entity commenced the investigation before a whistle-blower blew the whistle, he added. In defining “voluntary,” if a disclosure comes after an investigation by a regulator, it’s not voluntary, he added.

Why Requirement Was Waive

The commission appeared to waive the requirement because of claimant’s efforts, noting in its order that the claimant detailed “highly unusual circumstances,”:

- Prior to the enactment of the Dodd-Frank whistle-blower award program and its anti-retaliation protections, the claimant was working aggressively internally to bring the securities law violations to the attention of appropriate personnel and obtain corrective action for the benefit of investors.
- The inquiry into the self-regulatory organization originated from third-party information that in part described the claimant’s role in identifying the issue that gave rise to the violations and the claimant’s effort to obtain corrective action.
- The claimant was led to believe by the employer early on during the agency’s inquiry that the employer had provided the agency with all of the materials that the claimant had developed for his use in internal efforts to obtain corrective action.
- The claimant persisted in reporting to the commission once he learned that the self-regulatory organization’s inquiry had been closed and that the employer’s internal efforts would not protect investors from future harm.

The employer’s inadequate reaction to the self-regulatory organization’s inquiry played a role in the agency ignoring its own rules and making an award even though the claimant’s whistle-blowing wasn’t voluntary, Chinn said. This provides “another data point to look at and realize the need for an internal code of conduct, complaint mechanism, investigation process and remedial action when necessary,” he remarked.

“The whistle-blower did everything feasible to correct the issue internally. When it became apparent that the company would not address the issue, the whistle-blower came to the SEC in a final effort to correct the fraud and prevent investors from being harmed,” said Sean McKessy, chief of the SEC’s Office of the Whistleblower. “This award recognizes the significance of the information that the whistle-blower provided us and the balanced efforts made by the whistle-blower to protect investors and report the violation internally.”

The commission receives 3,000 tips a year, but so far has made only a handful of awards, Chinn noted. He said the commission is under pressure to make more awards, so employers can expect to see an uptick.