



SEC Welcomes Foreign Whistleblowers Though Courts Don't

By Ed Beeson

New York (September 22, 2014, 9:59 PM ET) -- As it doled out a record-smashing whistleblower award on Monday, the U.S. [Securities and Exchange Commission](#) sent a clear signal that it remains open to overseas tipsters even after a top federal court curtailed their right to sue.

In an order granting a bounty [worth as much as \\$35 million](#) to an unidentified claimant, the SEC staff also offered up a lengthy argument as to why the foreign resident is eligible for the cash despite the limits the federal judiciary has placed on overseas access to U.S. courts.

"In our view," SEC staff wrote in a footnote to Monday's whistleblower order, "there is a sufficient U.S. territorial nexus whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the commission, the U.S. regulatory agency with enforcement authority for such violations."

"When these key territorial connections exist," the staff continued, "it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas."

Attorneys say the SEC could be looking to protect the continued flow of whistleblower tips from foreign nationals. And given that awards to overseas residents make up a significant percentage of both the overall volume of tips and the number of bounties the agency has given out, companies should pay attention, they warn.

"It's a wakeup call for employers," said Steven Pearlman, a partner with [Proskauer Rose LLP](#) and co-head of its whistleblower and retaliation practice. "They have to wake up to the fact that tips are going to come in from overseas."

In a press release accompanying the award announcement, the SEC noted that Monday's order was the fourth whistleblower award given to a resident of a foreign country. Altogether, the SEC has issued just 10 orders approving whistleblower awards since the program's inception more than three years ago, though some of the award notices involve more than one person.

Meanwhile, the SEC has said [11 percent of its tips](#) had come from overseas whistleblowers.

Altogether, the agency dedicated more than a third of the order to explaining the appropriateness of the whistleblower award in light of the 2010 [U.S. Supreme Court](#) ruling in *Morrison v. National* and the more recent Second Circuit decision in *Liu v. Siemens*.

In *Morrison*, the high court found that claims under Section 10(b) of the Securities Exchange Act of 1934 apply only to transactions in securities listed on U.S. exchanges or to domestic transactions in other securities. The Second Circuit's *Liu* decision, reached in August, applied this ruling to the anti-retaliation provisions of the whistleblower programs created by the 2010 Dodd-Frank Act.

The length of the SEC's footnote struck some attorneys, given that the *Liu* decision, which said an SEC whistleblower in China [had no protection](#) under the agency's anti-retaliation measures, was based on questions of extraterritorial application of U.S. employment law rather than the bounty program itself. An SEC spokeswoman had no immediate comment.

“It’s guesswork as to why they wanted to include such a lengthy clarification here,” Pearlman said. But the footnote is “well-thought out and cited with authority.”

In some respects, the SEC could be looking to defend itself from potential critics, attorneys say.

“Maybe they’ve gotten some folks who have raised question as to whether they’ve got the authority to award overseas tipsters,” said Pearlman.

Even so, attorneys say they see no clear basis for an opponent of the whistleblower program to raise a legal question about awards to foreign nationals based on Monday's award.

“Unlike an employment law, the SEC incentive program doesn’t pose any risk of interfering with another country’s employment laws, which is one of the rationales that’s used when the question of extraterritorial application of employment retaliation laws comes up,” said David Marshall of [Katz Marshall & Banks](#).

There also was another, less visible message in Monday’s whistleblower order: the jaw-dropping award could have been even higher had the tipster come to the agency even earlier.

In an unusual move, the SEC criticized the whistleblower’s “unreasonable” delay in reporting the alleged wrongdoing to the agency, even if the tipster wasn’t sure the agency would take action on his information.

“There is always some measure of uncertainty about how a law-enforcement agency may respond to a tip, but in our view this does not excuse a lengthy reporting delay while investors continue to suffer losses,” the staff wrote.

Erika Kelton, a [Phillips & Cohen LLP](#) attorney who represented the whistleblower, told Law360 she disagreed with the commission’s characterization and said her client had come forward within a few months after the passage of the Dodd-Frank Act. Nonetheless, the agency staff said they ended up docking the total award the tipster received.

But other attorneys say prospective tipsters should heed the agency’s critiques carefully.

“The SEC is sending a strong signal that whistleblowers should report violations early on in order to protect investors,” said Jason Zuckerman, a Washington, D.C.-based sole practitioner who focuses on whistleblower claims. “His massive award will likely embolden more whistleblowers to take the risk entailed in coming forward and reporting fraud.”