

Corporate America, Expect A Spike In SEC Reporting

By **Christopher Regan, Thomas Sporkin, Timothy Coley and Ian Acker**
(April 30, 2018, 11:24 AM EDT)

Eight years ago, the big debate between corporate America and the U.S. Securities and Exchange Commission was whether whistleblowers should be required to report internally before being eligible for awards and protections under Dodd-Frank's anti-retaliation provisions. Ultimately, the SEC decided that the statute unambiguously prevented such an internal reporting rule; however, in an effort to mollify corporate America, the SEC, on its own, devised a few rules that it believed public companies could leverage to incentivize internal reporting (including bumping up the percentages for internal whistleblower awards and saving whistleblowers' place in line at the SEC if they followed internal reporting protocols).

In the ensuing years, many companies seamlessly integrated Dodd-Frank's rules and tools with Sarbanes-Oxley's infrastructure requirements to create ethical cultures that fostered safe working environments and welcomed employee concerns and reporting of questionable conduct. A few companies, however, lodged strategic one-off court challenges against a handful of internal whistleblowers, arguing that the SEC's interpretation was wrong and that Dodd-Frank did not protect internal whistleblowers who were fired before reporting to the SEC. A circuit split arose on the issue, and the debate became so hotly contested that individuals had to consider whether to report first to the SEC given the uncertainty of how a court could rule on the issue.

Fast-forward to February when, in the midst of this chaos, the U.S. Supreme Court finally settled the debate in favor of the one-off effort by Digital Realty to exclude an internal whistleblower from Dodd-Frank retaliation rights. Though this rebuke likely bruised the egos of those at the SEC who had fought hard to promote their vision of how best to incentivize corporate America and meritorious whistleblowers to work together in a safe environment, the big losers were actually those loyal employees who otherwise would have felt obligated to report questionable conduct internally, as well as the responsible corporations that desperately wanted to encourage the free flow of such information from their employees.

In addition to the Digital Realty decision, three other factors have also emerged that threaten to set the clock back on internal employee reporting. Together, as explained below, these factors could result in a torrent of whistleblower reporting activity, airing



Christopher
Regan



Thomas
Sporkin



Timothy
Coley



Ian Acker

corporate America's dirty laundry directly to the SEC, and leaving corporate America out in the wind.

1. First, the Trump administration and this Congress have placed a concerted emphasis on deregulation across the board. According to one White House press release, current deregulation efforts have resulted in a 22-to-1 ratio of deregulatory action for every new regulatory action, with promises of continued deregulatory focus in the coming fiscal year. If companies spend less on compliance, the possibility of malfeasance increases. Moreover, it is foreseeable that agencies across the government will commence more investigations based on whistleblower tips than on self-sourced intelligence. For instance, the U.S. Department of Justice's antitrust chief recently announced that the division remains "active and aggressive" and will be taking some steps to help encourage more whistleblowers to come in.

2. In addition, new studies confirm that sharp upticks in whistleblower reporting activity — and retaliation — are already underway. One report by the Ethics & Compliance Initiative found that individuals who describe observing misconduct in the workplace are blowing the whistle at the highest rate ever recorded (64 percent), and the percentage of those individuals who subsequently face some sort of retaliation is also at sky-high levels (44 percent).

3. Finally, and likely most important to whistleblowers, is the spike in large dollar awards. 2017 and 2018 have been robust years in terms of whistleblower awards. The SEC's 2017 report to Congress disclosed that, since its first award in 2012 through last fiscal year, the SEC's whistleblower program has awarded \$160 million to whistleblowers, with awards totaling nearly \$50 million in fiscal 2017. In other words, from a dollar standpoint, nearly one-third of all whistleblower awards issued up until that point were awarded in fiscal 2017.

The few whistleblower awards already announced this fiscal year, however, blow last year's figures clear out of the water. For instance, in March 2018 the SEC announced an award totaling \$83 million. Soon thereafter, the SEC announced two awards in April totaling more than \$4.3 million. As noted by Jane Norberg, chief of the SEC's Office of the Whistleblower, "[t]he SEC has issued nearly \$90 million in whistleblower awards in the past month alone," demonstrating the agency's continued focus on using high-quality whistleblower information as sources in its most fruitful investigations.

In light of this confluence of factors, today more than ever it is critical for publicly traded companies to instill confidence — both in their employees and the investing public — that they have embraced robust cultures of compliance that encourage individuals to report any conduct inconsistent with governing laws, rules, policies or procedures. Central to these efforts are mechanisms to ensure that reporting individuals will not face any sort of retaliation (large or small) for raising their concerns internally. These proactive measures may include strengthening internal reporting controls, providing periodic updates to internally reporting individuals to instill confidence in the integrity of an internal investigation, creating a company culture that encourages whistleblowers to speak up, providing internal awards for rooting out wrongdoing, and publicizing these efforts to normalize the compliance culture and popularize it among employees.

Several fronts are clearly looming, all of which suggest continued increases in SEC whistleblower reporting. Companies must batten down the hatches and meet the new challenges of this perilous landscape, while looking forward to additional obstacles that may be brewing just over the horizon.

Christopher F. Regan and Thomas A. Sporkin are partners, Timothy J. Coley is counsel, and Ian Acker is an associate in the Washington, D.C., office of Buckley Sandler LLP. Prior to entering private practice, Sporkin spent more than 20 years with the SEC's enforcement division, where he helped launch the SEC's whistleblower office and wrote the whistleblower rules called for by the Dodd-Frank Act.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.