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WHEN “GATEKEEPERS” BECOME WHISTLEBLOWERS: A FOCUS ON COMPLIANCE PROFESSIONALS IN SEC ENFORCEMENT ACTIONS

In administering its whistleblower program, the SEC has generally found that a compliance professional who becomes a whistleblower is ineligible for an award. There are, however, narrow exceptions and awards have been granted in such cases. In this article, the authors describe the SEC’s program rules and their application in the few cases in which awards have been made. They then turn to the anti-retaliation provisions that protect compliance insiders from reprisal for reporting misconduct. They conclude with key lessons learned for effective compliance programs in light of the SEC’s treatment of some gatekeepers as whistleblowers.

By Ronald C. Machen and Cadene Russell Brooks *

On May 25, 2011, Robert Khuzami, then Director of the Division of Enforcement of the Securities and Exchange Commission, announced the publication of final rules that would establish the SEC’s Whistleblower Program.¹ Now in its ninth year, the SEC has awarded more than \$500 million to 83 whistleblowers.² These awards are funded through monetary sanctions paid to the SEC by violators of various securities laws.³

¹ Robert S. Khuzami, Former Director, SEC, Division of Enforcement, *Remarks at Open Meeting-Whistleblower Program* (May 25, 2011), <https://www.sec.gov/news/speech/2011/spch052511rk.htm>.

² SEC, Press Release No. 2020-126, *SEC Awards Record Payout of Nearly \$50 Million to Whistleblower* (June 4, 2020), <https://www.sec.gov/news/press-release/2020-126>; SEC Press Release No. 2020-89, *SEC Awards Over \$27 Million to Whistleblower* (Apr. 16, 2020), <https://www.sec.gov/news/press-release/2020-89>.

³ SEC Press Release No. 2020-89, *supra* note 2.

Congress directed the SEC to establish the whistleblower program pursuant to the Dodd-Frank Act with the goal of supporting the SEC’s effort to incentivize the reporting of securities violations.⁴ Under the program rules, whistleblowers who “voluntarily” provide the SEC with “original information” that results in a successful enforcement action yielding monetary sanctions over \$1 million are entitled to receive an award of between 10 and 30 percent of money collected as a result of the enforcement.⁵

On March 30, 2020, the SEC announced a \$450,000 award to a whistleblower whose reporting provided significant assistance to an investigation by the SEC’s

⁴ 2018 Annual Report to Congress Whistleblower Program, SEC, <https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf>.

⁵ 17 C.F.R. § 240.21F-3(a); SEC Press Release No. 2011-116, *SEC Adopts Rules to Establish Whistleblower Program* (May 25, 2011), <https://www.sec.gov/news/press/2011/2011-116.htm>.

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