Governance Watch Webcast: Recent Developments About Whistleblowers Under Dodd-Frank and the SEC's Whistleblower Program

On Thursday, August 20, Cleary Gottlieb and The Conference Board's Governance Center presented Cleary partner Victor Hou and counsel Caroline Hayday in an hour-long discussion of Dodd-Frank's whistleblower provisions, looking at developments and trends that have emerged since the program was put in place in 2010.

Dodd-Frank Whistleblower Rules

Mr. Hou began the presentation with a review of the whistleblower rules under Dodd-Frank, with a focus on the bounty program and whistleblower protections. He called the Dodd-Frank whistleblower program "a game-changer" and noted that only now, with a few years of enforcement actions under the program, are companies and lawyers able to identify program trends.

One of the rules that Mr. Hou clarified was the requirement that a tip be derived from the whistleblower's independent knowledge of the matter. *Independent* knowledge, as defined by the SEC, does not require *personal* knowledge. "It's any information that the whistleblower obtains and possesses from conversations that they have, or any documents," he said. "So it could be unlimited layers of hearsay, as long as that information is not otherwise known by the SEC."

However, he added, the information cannot be obtained in a way that violates federal or state criminal law, including document theft, or through violation of attorney-client privilege. But the SEC does provide avenues for attorneys who want to blow the whistle, including disclosures that would be permitted under the SEC's or a state's rules for attorney conduct.

The SEC Bounty Program

In discussing the impact of the bounty program, which offers monetary rewards to whistleblowers whose tips result in enforcement actions of $1 million or more, Mr. Hou suggested that while there is not clear data that this feature is solely responsible for the yearly increases in whistleblower tips being submitted to the SEC's Office of the Whistleblower, he suspects that it "has played an enormous role." (As of July 2015, the SEC has awarded more than $50 million to 18 qualifying whistleblowers.)

Mr. Hou added that as the SEC has had a growing number of tips submitted by potential whistleblowers, the agency also has seen "a rapid increase in what they call 'serial filers,' who submit repeated allegations and alleged tips," which has led the SEC to bar certain people from submitting tips.

Employee Whistleblowers

Ms. Hayday spoke about the program's structure in an employment law context, focusing particularly on fear of retaliation in escalating possible violations of law internally at their employer. "It's ingrained almost from birth that to be a snitch is undesirable," she said, and employees are likely to think that blowing the

whistle will be detrimental to their careers. She also noted that employees may not know the correct way to escalate a compliance issue internally. To encourage internal reporting so that reporting to the SEC becomes an avenue of last resort, companies should foster a culture of compliance, and communicate procedures for employees who want to report issues and policies that will protect them from retaliation, and Ms. Hayday stressed the importance of documenting everything that occurs internally regarding a whistleblower. “The SEC has been very clear throughout that this is supposed to complement an internal process at the company,” she said.

In the Matter of KBR, Inc.

Ms. Hayday used the SEC’s case April 2015 enforcement action against KBR, Inc. to discuss how confidentiality provisions in a company’s agreements with its employees and contractors can conflict with the agency’s Rule 21F-17, which says companies cannot “take any action to impede an individual from communicating directly with [SEC] staff about a possible securities law violation.”

The SEC said that KBR’s employee confidentiality agreements were worded to suggest that employees could be disciplined or terminated for whistleblowing.

The company paid a $130,000 fine and amended its confidentiality agreements. Ms. Hayday said the SEC intended to “vigorously enforce” this Rule and specifically encouraged “all employers to look at any agreement that they might have with an employee that contains these types of provisions” that might suggest restrictions on going to a federal regulator as a whistleblower.

Ms. Hayday advised that following such a review, companies should communicate to affected individuals that existing provisions are in no way intended to impede their ability to report violations to any federal agency, and ensure that future agreements contain an express carveout to that effect.

Mr. Hou noted that despite the SEC’s action in the KBR case, companies still retain certain protections on internal information. “Internal investigations are still subject to work-product protection,” he said. “When you interview even a whistleblower, that communication, in the right context, is still and should remain privileged.”

Looking Ahead

Overall, Mr. Hou expects to see more activity from the SEC and those who might participate in the Dodd-Frank whistleblower bounty program. “What we’re seeing now is a maturation of these tips,” he said. “I think we’re going to see an increase in the number of whistleblower awards and an increase in the amounts” awarded by the agency.

The full webcast presentation is available on demand from The Conference Board here.