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Does My Client Have a Whistleblower Rewards Claim?

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Special to the Legal

Whistleblowers are having a moment. Several individuals have made major forays into the public consciousness for blowing the whistle on their employers. They include, most recently, the Facebook whistleblower Frances Haugen and the Theranos whistleblowers Tyler Shultz and Erika Cheung. Federal legislators have likewise introduced a number of bills to add legal protections and financial incentives for individuals interested in stepping forward with information about violations of anti-trust, consumer protection and consumer finance laws. And, just last fall, the Commodity Futures Trading Commission awarded the largest-known single award—\$200 million—under the whistleblower programs established by the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.

Whistleblowers are finally being recognized for the tremendous value they add, and courage they exude, in bringing misconduct to light. Attorneys of all stripes may therefore



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see an uptick in potential clients seeking counsel on whistleblower laws, and what protections or rewards they may be eligible for under those laws. While these individuals' legal options may expand as more whistleblower laws continue to get passed, it is important to first understand the whistleblower rewards claims available to clients now—namely, those addressing fraud involving federal funds, securities, commodities and taxes.

BACKGROUND ON PROGRAMS

The federal government passed the False Claims Act in 1863 to address procurement fraud being committed on the Union Army during the Civil War. The FCA underwent significant amendments in 1986 and 2009 that extended its reach from historical wartime frauds (for example,

selling the government “gunpowder” that was sawdust) into a wide array of industries where government funds were present and fraud was being committed. Today, FCA claims filed in federal court address a broad spectrum of misconduct, such as Medicare/Medicaid fraud, violations of cybersecurity requirements by government contractors, and tariff and customs evasion. Whistleblowers file False Claims Act complaints under seal with the Department of Justice and, if successful, are eligible to receive between 15% to 30% of monies recovered by the government along with reasonable attorney fees and expenses.

Relative to the FCA, the whistleblower programs administered by the U.S. Securities and Exchange and Commodity Futures Trading Commissions are in their infancy. Both programs, however, have had tremendous success in the decade since the enactment of the Dodd–Frank Act. The SEC whistleblower program addresses a broad scope of securities fraud issues, while the CFTC whistleblower program takes on commodities and derivative-related frauds. Under these programs,

whistleblowers file tips with the agency involved and, if successful, are eligible to receive between 10% to 30% of monies collected by the SEC or CFTC so long as the agency recovers more than \$1 million.

Much older than the Dodd-Frank programs, and just four years younger than the FCA, the Internal Revenue Service has administered its whistleblower program in some form since 1867. As with the FCA, though, the IRS whistleblower program became much more active in the wake of enhancements made by the Tax Relief and Health Care Act in 2006. Individuals become eligible for a whistleblower reward—typically between 15% and 30% of the monies collected—if the IRS pursues a judicial or administrative action and collects proceeds exceeding \$2 million, or if the taxpayer's gross income exceeds \$200,000 where the taxpayer is an individual.

In addition to the FCA and three major administrative programs, several other whistleblower reward laws are worth noting. Though in its nascent stage, Congress recently passed legislation to enact a whistleblower rewards program to be administered by the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury, to address violations of the anti-money laundering laws. In addition, just last November, the National Highway Traffic Safety Administration awarded \$24 million to an individual who reported fraud under its whistleblower program, which rewards employees and contractors of motor-vehicle manufacturers, parts suppliers, or dealerships that report

vehicle-safety violations. Finally, two of the country's most populous states, Illinois and California, maintain statutes that allow whistleblowers to obtain financial awards for reporting fraud impacting private insurers—expanding the traditional reach of such statutes beyond government funds.

It would behoove sophisticated corporate counsel to familiarize themselves with the available whistleblower laws so that they can more fully advise clients on available offensive strategies when faced with a competitor gaining an unfair advantage in the marketplace by committing fraud.

ISSUES

For the fiscal year ending on Sept. 30, 2021, the Department of Justice obtained more than \$5.6 billion in False Claims Act settlements and judgments, with \$1.6 billion of those funds stemming from whistleblower-initiated lawsuits—leading to \$237 million in whistleblower awards. Of the more than \$5.6 billion recovered, nearly \$5 billion involved matters concerning health care industry defendants, including drug and medical device manufacturers, managed

care providers, hospitals, pharmacies, hospice organizations, laboratories and physicians. Health care focused recoveries addressed unlawful kickbacks under the Anti-Kickback Statute, Medicare Advantage fraud, and the provision of unnecessary medical treatments or unskilled services. FCA cases do, however, arise outside of the healthcare space and often involve government grant fraud; procurement fraud and collusion, including bid rigging, price fixing, and market allocation; financial fraud; and COVID-19 relief program fraud.

Last year, the SEC obtained nearly \$5 billion in monetary sanctions from enforcement matters based on information from whistleblowers. This led to roughly \$564 million in whistleblower awards, pushing the total amount of whistleblower awards past \$1 billion since the agency issued its first award in 2012. Though the SEC does not typically reveal specific matters leading to whistleblower awards, SEC enforcement actions often address bribes or improper payments made to foreign officials in violation of the Foreign Corrupt Practices Act; false or misleading disclosures made to the SEC; insider trading; investment advisor fraud; public offering fraud; Ponzi and pyramid schemes; market manipulation; cryptocurrency fraud, including fraudulent initial coin offerings; and misconduct relating to municipal securities or public pension plans.

The CFTC whistleblower program also continued its upward trajectory in the 2021 fiscal year, issuing \$123 million in whistleblower awards. That amount does not, however,

include the above-mentioned \$200 million reward made on Oct. 21, 2021. The CFTC polices fraud relating to commodities and, also, the derivative markets, including futures, options and swaps. Like the SEC, the CFTC does not typically reveal specific matters leading to whistleblower awards; however, misconduct governed by the CFTC often involves traditional commodities (e.g., corn, soybeans, etc.) and financial products such as futures and options contracts or currency-based instruments. Commodities and derivatives-related misdoing may include fraud schemes; market manipulation, such as spoofing or price fixing; and trade practice violations, such as wash sales and records-keeping violations.

While the IRS whistleblower program has not had nearly the same success as the SEC and CFTC whistleblower programs over the last few years, some legislative proposals will hopefully bring it up to speed. Indeed, the IRS Whistleblower Program Improvement Act was introduced on June 15, 2021, and seeks to address substantive and operational deficiencies the program faces. Such changes are needed to address the well-documented epidemic of tax fraud from which our country currently suffers.

WHO MIGHT BE ELIGIBLE?

The prototypical whistleblower is the company insider. These individuals may be C-suite executives, middle managers or rank-and-file employees. They may arrive at a trusted counselor's office with concerns of illegality, misconduct or noncompliance at their workplace. Alternatively, they may reach out to an attorney with

experience in employment retaliation matters for advice on hostile work environment issues after having reported such misdoing internally. And if they are in a senior role, these issues may arise in discussions with an executive compensation lawyer tasked with negotiating their exit.

To be sure, though, not all whistleblowers are current or former employees of the target defendant. One federal appeals court recently recognized that "corporate insiders are not the only individuals who qualify as [False Claims Act] relators or original sources under the law." Likewise, SEC and CFTC whistleblowers need only provide the government with information pertaining to violations of the federal securities or commodities laws—no insider requirement exists. The IRS whistleblower program is similarly broad and applies to individuals who provide actionable information about others who underpay their taxes.

These broad eligibility requirements have led to a wide array of individuals and corporations (although only under the FCA can entities serve as whistleblowers) stepping forward to blow the whistle. These individuals and organizations include competitors, nonprofits, data and investment analysts, patients, victims of consumer fraud, and industry experts.

Thus, it would behoove sophisticated corporate counsel to familiarize themselves with the available whistleblower laws so that they can more fully advise clients on available offensive strategies when faced with a competitor gaining an unfair advantage in the marketplace by committing fraud. Likewise, non-profit

attorneys may advise their clients that their ability to make a broader and deeper impact on the public good can be enhanced if they report systemic wrongdoing, particularly when the misconduct involves government funds or subsidies. And personal injury and consumer protection lawyers may come across healthcare or financial fraud schemes when hearing about their aggrieved clients' ordeals or reviewing their medical or financial records.

In short, attorneys of virtually all practice areas would be well-served to stay apprised of the burgeoning whistleblower legal regime in the United States. As the government continues to increase its spending and corporate America continues to extend its reach, the opportunities for fraud and abuse will continue to abound. And as more fraud occurs, it remains all the more critical for attorneys to be able to determine whether their potential client's best legal strategy for dealing with an instance of such fraud is simply blowing the whistle on it. •