EMBARGOED UNTIL DELIVERY

Statement on the Amendments to the Whistleblower Program Rules
Commissioner Allison Herren Lee
September 23, 2020

In recent times, it seems that nearly every day has provided us with an opportunity to appreciate the contributions of whistleblowers. Often, they display extraordinary bravery to expose fraud and wrongdoing, and to shine light in some very dark places. In doing so, they reinforce our fundamental values – that the rule of law matters, and no one is – or should be – above the law. All too often, sometimes very publicly and sometimes in the shadows, those whistleblowers face retaliation from the powerful figures they expose. As a former enforcement attorney, I know well the value whistleblowers bring and the obstacles they face. They help create transparency, and from transparency flows crucial accountability. Unfortunately, today's rules do not serve these individuals well.

Our whistleblower program is administered by the excellent staff in our Office of the Whistleblower, along with a dedicated team in our Office of the General Counsel, which works with the whistleblower office to parse difficult legal issues. The partnership works extremely well, and I want to take this opportunity to commend both offices for their tremendous work over the years not only administering the program, but also drafting—and re-drafting—this rule. As always, I am tremendously grateful to them for their dedication and commitment to our mission. My position on this rule reflects my view of the top-down policy decisions driving it, not the incredible work of the staff. They have provided thoughtful and steady counsel throughout this process, and I am grateful for their professionalism.

DISCRETION TO ADJUST AWARDS BASED ON SIZE

The principal reason that I find myself unable to support this rule, despite trying very hard to reach consensus, is because of the treatment given to the central issue of the Commission's discretion to consider the dollar amount of an award in making award determinations. Let me explain. The proposal would have granted to the Commission new discretion to reduce awards in cases where collections exceeded $100,000,000 if a majority of Commissioners thought simply that the dollar amount of the award was just too high. The proposal contained a very specific hypothetical that posed the following scenario. Assume you have a whistleblower who did everything right. Further assume that this whistleblower is eligible for an award for a matter in which a 10% award would equal an $80 million payout, and a 30% award would equal a $240 million payout. The proposal stated that, absent the proposed 2018 rule change, "the Commission *would lack the authority to adjust the award amount downward* if it found that amount unnecessarily large for purposes of achieving the whistleblower program's goals." The proposal went on to state that "the Commission would almost certainly be obligated to pay this individual an award at or near the maximum $240 million level under the existing rules."

Now, where did the final rule land on this point? Remarkably, the final rule actually claims that the entire premise of the hypothetical—and the basis for the central proposed rule change in the proposal—was mistaken. Indeed, the final rule says that the hypothetical was incorrect and did not reflect the Commission's prevailing understanding of its discretion or its practice in considering and applying the Award Factors and setting Award Amounts. Rather, now, according to this new understanding, the discretion to reduce an award that a majority of the Commission deems too large (or even one that it feels is unnecessarily small), actually existed all along in the statute, despite the Commission's view in 2018.

And now we newly claim the authority to use that discretion. So, what is the implication of this surprising reversal? We claim a new discretion to consider dollar amount in the setting of award amounts that is broader than the discretion we proposed to write into the rule at proposal, applicable to all awards no matter their size. There is no transparency in its usage, and it provides whistleblowers no way to contest its application.

Here is how that works. First, the rule text from the proposal that contained the discretion has been removed. Instead, that discretion isn't mentioned in the rule text. Why? Because, according to the new interpretation, the discretion existed all along in the statute and we don't need a new rule to provide it. But we do have new rule text, so what does it say? It says in making an award, the Commission may consider the same factors, and ***only*** those same factors, that we have always considered (including positive factors such as the significance of the information provided by the whistleblower, and negative factors such as the degree of the whistleblower's culpability) in setting the "dollar or percentage amount of the award." At first blush, it appears this rule text restricts us in exactly the manner in which we said we were restricted in assessing the 2018 hypothetical. That is, we do not have the discretion to reduce an award to a whistleblower who had done everything right under the existing factors.

But here's the rub. As I mentioned, the release now says we were wrong with our 2018 hypothetical – and we in fact ***can*** exercise discretion to change the outcome of that hypothetical case.

How do we square that with the reg text that seems to say otherwise? It appears that we are saying throughout the release that we now have the authority or ability to somehow "think" in terms of dollars when applying the award factors, but the release is at pains to suggest that this is not to say that we can just adjust an award based on its size alone. But, of course, we don't need a rule to tell us when and how we can "think" or translate percentages into dollars in our heads. Assuming this new discretion we now claim to have had all along means something beyond permitting us to do math in our heads as we consider the original factors, I endeavored to find out exactly *what*.

I posed a new hypothetical: Under the rule we adopt today, assume two cases: in both cases, we are presented with the exact same whistleblower and exactly the same facts in every way. The only difference is that in Case A, the monetary sanctions collected total $10,000,000, while in Case B, the monetary sanctions collected total $500,000,000. Under this new interpretation of our authority, I asked, can the Commission reach a different award *percentage* between these two cases? Again, not one single fact is different except the dollar size of the potential award. The answer I was given was an unequivocal "yes."

That tells me everything I need to know about what can or cannot be considered under this new rule. If we were going to be confined to the existing original factors under the new rule, there should be no difference in the outcome—in terms of the percentage of the award—between Case A and Case B.

So, to recap. We said at proposal that we needed a rule that would allow us the discretion to consider dollar amounts, but that our proposed rule would limit the use of that discretion to only cases in which the money collected totaled at least $100,000,000. Now, we claim that we do not need a new rule at all, that we've had this discretion all along. In fact, the new rule is even more problematic than the proposal because we are no longer even restricted to the largest awards. We may exercise this newly-claimed discretion to adjust awards up or down, on any case, large or small, so long as we say that we are doing so "in considering and applying the award factors" whatever that may mean.

And importantly, the rule will not require the Commission to tell whistleblowers if or when we have exercised this discretion. Thus, there will be no transparency, and no accountability.

I tried hard to understand how we got here, and I tried hard, as did my colleagues, to find some potential way to get to a consensus, which I think is especially important here. But ultimately, I cannot support a rule that allows two different outcomes where the only difference is the size of the amount collected. By definition, that means that the dollar amount or size of the award is factored into our consideration. The concerns with the original 2018 proposal were that it would allow the reduction of awards on the basis of a pure objection by the Commission to the size of an award. I would not have supported writing that ability into our rules. Unfortunately, today's rule simply assumes the existence of that ability, and sets no real limitations on its use.

I certainly don't doubt assertions by individual Commissioners about how they would or intend to use this discretion. I don't doubt their commitment to the program. Unfortunately, their assertions are not relevant to the wisdom of the new rule because future Commissions will not be bound in any way to take a similar approach to the exercise of this newly asserted discretion.

RELATED ACTIONS

Today's rule includes other policy choices that raise concerns, including a new and problematic definition of "independent analysis," an overly restrictive requirement that whistleblowers provide information "in writing" in order to qualify for protection from retaliation, and a TCR filing requirement which, though improved from the proposal, is still too inflexible. I want to address in more detail, however, the way we are interpreting the definition of a related action; that is, an action brought by another governmental agency that is based on the information provided to the SEC by a whistleblower, and therefore eligible for an award through the SEC's whistleblower program. Our ability to pay an award on a related action promotes efficiency and certainty for whistleblowers by ensuring that they will get an award when other parts of the government act on a whistleblower's tip. It encourages whistleblowers to choose to bring information to us, knowing they will still receive an award if the information is directed to a different agency. Unfortunately, the rule we are adopting today limits our payment of related action awards.

Though the statutory text dictating that we "shall pay" awards in related actions is unambiguous, we are today adopting a rule that decreases certainty by introducing a new, subjective standard, which is whether another agency's whistleblower program has a "more direct or relevant connection to the action." If we determine that it does, the whistleblower must recover separately from that agency's program. The release frames this as a necessary measure to prevent whistleblowers from recovering from multiple agencies for the same conduct. While I appreciate the concerns about taxing our and our sister agencies' resources with whistleblowers taking "multiple bites of the apple," I believe other solutions were available, which would have better balanced the agency's interests with those of whistleblowers.

Directing whistleblowers to another agency's whistleblower program can have real impacts. It will increase the administrative burden on the whistleblower, who may already be in difficult circumstances. It may also force them to participate in programs with varying standards for maintaining the confidentiality of their identity, an issue of critical importance to many whistleblowers. Moreover, some whistleblower programs may have materially lower maximum awards, including some with statutory caps at a certain

dollar amount. Our rules already did contain a provision to foreclose recovery of multiple awards when there is a related action involving the CFTC; I would have supported a rule more similar to that one, rather than the approach we chose, which is both inefficient and inflexible, to the detriment of whistleblowers.

IMPROVEMENTS TO THE RULE

Now, before I conclude, I want to be clear that this rule does contain improvements, designed to address issues that have arisen in the course of the last 10 years. These improvements were the original impetus for us to revisit the rules. I am hopeful that they will provide substantial benefits for whistleblowers, and for our administration of the program. In particular, the new summary disposition procedures and the ability to bar individuals who make repeated, frivolous awards claims will allow our staff to expend their limited resources on processing meritorious claims. Similarly, codifying our practice of treating Deferred- and Non-Prosecution Agreements as covered or related actions is an appropriate and welcome measure to ensure that whistleblowers are not disadvantaged by the Commission or the Department of Justice's choice of resolution mechanism.

I appreciate these efficiency improvements, but they do not outweigh the very real problems in the rule we are adopting today. In sum, at a time when the importance of whistleblowers has never been clearer, I cannot support these new rules that in too many ways increase discretion and restrict access to our program without providing essential clarity, transparency, and accountability.

I must respectfully dissent.