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In-house lessons from the SEC's whistleblower rule updates

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Audrey Harris and Juliet Gunev

Mayer Brown's Audrey Harris and Juliet Gunev discuss how recent changes to the SEC's whistleblower rules can help companies find ways to strengthen their own compliance efforts.

In a long-anticipated move, on 24 September, the US Securities and Exchange Commission (SEC) adopted a number of amendments, updating the rules that govern its whistleblower programme (the Rule Updates). The key changes include a presumption in favour of awarding the maximum bounty in smaller cases (under $5 million), re-defining the definition of "whistleblower" to conform with the US Supreme Court decision in *Digital Realty Trust v Somers* (including as to protection against retaliation for whistleblowers reporting to the SEC first), expanding the definition of "successful enforcement" for which awards may be claimed, and various other procedural amendments aimed at improving the efficiency of the claims and awards processes.

The SEC chairman's announcement accompanying the Rule Updates looks, in some ways, like a chief compliance officer's report to the board of directors. Beyond the technical changes, the Rule Updates and Chairman Jay Clayton's remarks contain trends and terms that represent opportunities for companies to use the Rule Updates to enhance their own internal programmes. Consistent with recent updates by the US Department of Justice (DOJ) to its guidance to prosecutors on "Evaluation of Corporate Compliance Programs" (Evaluation Guidance), companies are well advised to take opportunities to review and

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adapt their compliance programme based upon lessons learned from others – including even, in this case, the SEC.

In that context, the following article goes beyond the Rule Updates, to ask: What can companies apply from the SEC whistleblower programme's learnings to improve their own compliance processes?

Whistleblower trends

The chairman's announcement reinforces that overall claim numbers, metric reporting, and expectations of transparency continue to rise, and are core to both the SEC and internal company programmes.

Increasing reports, number of awards and amount of awards

The chairman's remarks started, as chief compliance officers' reports often do, with the numbers. The pie charts and metrics all pointed in one direction: up. The last four years, from 2017 to 2020, represent 61% of all awards by year, and 74% of the total amounts awarded under the whistleblower programme since its inception in 2012. In reference to fiscal year 2020, the chairman noted that, despite the effects of the covid-19 pandemic, there had been, "more claims reviewed so far this fiscal year than any previous year."

Living in glass houses: Transparency is paramount

The Rule Updates reinforce what many chief compliance officers already know: their job includes the additional uncredited role of chief transparency officer. Transparency is a term that features prominently in the chairman's announcement. The Rule Updates further incentivise whistleblowers to directly and concurrently report to multiple regulators in writing. This encourages internal company programmes to assume that any internal allegation is already in the hands of regulators, before any chance to investigate, and evolve their programme structure and response accordingly. In this context, the importance of effective triage and assessment has become more important than ever. Companies that take a proactive approach to business conduct concerns, via heat mapping and analysis, will find themselves better placed to identify emerging areas of risk, and take preventative action before hot spots escalate into red flags.

Key terms and what they mean for a compliance programme

Several key terms appear in the headings and throughout the chairman's speech including: *faster, efficiency, resource allocation, transparency* and *clarity of outcome*. The role these concepts play in the SEC's whistleblower Rule Updates provides additional guidance, and highlights areas for potential application in corporate programmes.

Efficiency is part of effectiveness

The chairman's speech repeats an all too familiar in-house challenge: How do you meet an expectation of faster reporter/claim response, while also tackling the increase in the raw number of incoming reports? Three strategies the SEC is using in this context come through clearly in the Rule Updates.

1. ***Using metrics and learnings to simplify processes***: The chairman's explanation of the Rule Updates regarding how whistleblowers can expect the maximum

statutory award possible for rewards worth less than $5 million illustrates an effective tool any programme can use to improve efficiency and response time. Using metrics to see a pattern of award outcomes, it was decided that the resources involved in the previous detailed review were not resources-to-risk, or a good return-on-investment. By changing the presumption (e.g. process or triage), the SEC could free up resources on a significant number of claims, and speed up claim response times. In referencing the Rule Updates, the chairman noted, "based on our experience, we can add more certainty around time and amount in the substantial majority of cases, enhancing the effectiveness of the program for the Commission and increasing incentives for whistleblowers, all with no meaningful countervailing cost." This encourages companies to do the same in their programmes. *Companies should ask themselves: Are we using our data and learnings to find areas within our own programmes where processes may be adding time, but not proportionately impacting outcome and risk mitigation?*

2. ***If everything is important, then nothing is:*** Another strategy concerns the critical role of a principled method for triage. In presenting the case for the Rule Updates, the chairman promoted every compliance programme's life-blood: Resource allocation. He reasoned that "these amendments are intended to allow the Commission to allocate resources where they will most effectively advance the objectives of the whistleblower program . . ." A key to resource allocation is triage, and identifying the right matters to escalate and prioritise, which includes something that can feel dangerous to admit – that is, while the vast majority of reports are genuine and good-faith step-up efforts, not all reports are created equal, and there are the exceptional repeat frivolous claims or personality conflict reports, that if not appropriately triaged, can dilute your programme response. The chairman addressed this directly noting, the “amendments would free up staff resources by providing a mechanism to – with sufficient process – bar those individuals who repeatedly file frivolous applications from submitting future award claims. Similarly, today’s amendments also will improve efficiency by allowing for a summary disposition process for certain types of straightforward denials, such as failing to meet application deadlines or failing to specify the tip on which an award claim is based." *Companies should consider: Are we continuously evaluating our principled-base triage matrix to ensure that the available resources can be at their most effective?*

3. ***The connection between efficiency and effectiveness:*** As the old saying goes, "justice delayed, is justice denied." The terms e*fficiency, faster, streamline* and *substantially accelerate*, all appear in the chairman's remarks, re-enforcing the reality that the speed of response to whistleblowers often speaks louder than words. This is why tracking days from allegation to investigation, decision and remediation (especially based on triage type) is an important metric for in-house programmes, just as it is for the SEC. Extended periods of time, especially without communication as to why, can result in loss of whistleblower and employee trust. *A related question for companies is: Is everything being equally "important" resulting in functional delays that could be unintentionally messaging to their employees that critical good faith and speak-up moments aren't important?*

Prioritising simplicity and clarity

Versions of the words *clear* and *clarity* appear eight times in the relatively short chairman's speech announcing these changes. This is consistent with a foundational compliance principle that in order to trust in a process, individuals need to understand the why and the how. Simple and clear compliance communication is often the most effective preventative control, simply because it provides guidance that can be understood and acted on. In announcing the Rule Updates the chairman reasoned that, "these amendments are designed to provide clear guidance to whistleblowers. They are also intended to reduce the chance of an individual being disqualified from receiving an award simply because of a lack of knowledge of our filing requirements. . . "

Businesses should ask themselves: Are we documenting and communicating our programme's principled reasoning, and "why" of its decision-making? Does our code of conduct make the process for reporting, triage, investigation and adjudication of reports clear? Do whistleblowers know what they can expect from the process?

Promoting transparency around discretionary decision-making

The more areas of compliance decision-making that are seen as being overly discretionary, or "a bit of black box," the less willing individuals are to participate in, and trust the process. The chairman acknowledged this connection, and the necessity to be clear where areas of discretion exist and transparent about the factors that will be used to apply that discretion in determining awards, noting: "[It] was evident during the rulemaking process, there was public confusion about the Commission's discretion in applying those factors. . . . Also, to be clear, in determining the award amounts, we apply the factors and only the factors, to determine the amount. There is no separate (post application of the award factors) assessment . . . ." This encourages companies to do the same – by considering how they are using transparency around discretionary decision-making to promote a culture of trust. It also overlaps with the DOJ's recent updates to its Evaluation Guidance, that emphasised tracking the reporting and investigation process for consistency in terms of incentives and disciplinary outcomes. *Compliance officers should consider: Do we have mechanisms for proactively sharing the factors that are to be taken into account in disciplinary and remedial actions? Are there ways to illustrate the application of those factors and outcomes of the process (even if via anonymous hypotheticals or other manner consistent with the balance of privacy and other legal and fairness considerations)?*

Encouraging employees to speak-up, and being able to respond to whistleblower concerns credibly and consistently, is only increasing in importance. By reflecting on the SEC's own whistleblower programme learnings, companies can turn trends and themes into tools to improve and add tangible value to their own compliance efforts.

Audrey Harris is a partner and co-chair of Mayer Brown's global anti-corruption and FCPA practice, and former chief compliance officer at BHP.

Juliet Gunev is an associate at Mayer Brown.

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