

Gensler-Led SEC Demonstrates Continued Support for Whistleblowers

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On August 5, the Securities and Exchange Commission (SEC) announced interim procedures effectively nullifying amendments to the SEC's whistleblower program adopted less than a year ago under former SEC Chairman Jay Clayton.^I The controversial amendments gave the SEC discretion to reduce the size of monetary awards for whistleblowers in certain instances and deny awards entirely if a whistleblower was also due to receive an award under a competing non-SEC whistleblower program. In support of the reversal, SEC Chairman Gary Gensler cited concerns raised by the whistleblower community and Democratic SEC Commissioners that the amendments had the potential to "discourage whistleblowers from coming forward."^{II}

The SEC's whistleblower program was created in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act and directs the SEC to provide monetary awards to individuals who supply information leading to SEC enforcement actions. Under the program, a whistleblower may receive up to 30 percent of the fines levied by the SEC in enforcement actions that stem from his or her tip. Chairman Gensler's actions come on the heels of a record quarter for whistleblower awards, with over \$178 million doled out to tipsters during the second quarter of 2021, topping the previous record of \$176 million from the fourth quarter of 2020.

Recent enforcement activity suggests the Gensler-led SEC is willing to take an expansive view of what kinds of tips merit an award in order to encourage whistleblowers to come forward. On May 19, the SEC announced it was upholding an award for a whistleblower whose tip eventually lead to the unveiling of unrelated improprieties, even though the original information provided by the tipster did not in of itself lead to enforcement action.^{III} Significantly, the Gensler-led SEC has also demonstrated a willingness to overlook administrative foot-faults in order to reward whistleblowers who have provided valuable information, recently invoking rarely used discretionary authority under Section 36(a) of the Exchange Act to uphold a \$23 million award^{IV} for two tipsters who had filed their award

application 18 days after the 90-day submission deadline had passed, a scenario in which previous regimes were unwilling to waive the procedural defect and had revoked awards.^V

Since 2012, the SEC's whistleblower program has paid out approximately \$937 million to tipsters. The pace of recent activity suggests total whistleblower awards may soon surpass \$1 billion. In addition to maintaining and continually strengthening internal reporting and compliance mechanisms to prevent fraud and securities law violations, reporting companies are advised to regularly review their internal reporting structures to ensure any whistleblower tips provided are properly reviewed, escalated and acted upon. Thorough investigations and a robust response are essential in creating a defensible position in the event regulators or law enforcement become involved.

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I See the SEC's release announcing the interim procedures

here:https://business.cch.com/srd/The_Securities_and_Exchange_Commission.pdf. The speed with which the Democratic-appointed SEC Chairman Gary Gensler is walking back rules enacted by his Republican-appointed predecessor is notable and was criticized by SEC commissioners Hester Peirce and Elad Roisman, both appointed under the Trump administration, who released a joint statement criticizing Gensler's actions: "This course of action is unwise and continues a troubling and counterproductive precedent...Abandonment of duly-adopted rules without notice and request for comment raises the prospect that the rules that the Commission adopts in compliance with the Administrative Procedure Act may be interim at best, and transitory at worst." See https://business.cch.com/srd/Todays_the_Commissionissuedastatementannouncing.pdf.

II See <https://www.sec.gov/news/public-statement/gensler-sec-whistleblower-program-2021-08-02>. Chairman Gensler was a vocal proponent of the whistleblower program during his nomination process. See <https://z6t5r8d4.rocketcdn.me/wp-content/uploads/2021/03/Senator-Grassley-questions-3.17.214.pdf>.

III The SEC acknowledged there was "not a strong nexus between the Claimant's information" and the eventual charges but noted that although the "charges involved misconduct in geographical regions that were not the subject of the Claimant's information," an award would nonetheless be granted that "appropriately recognizes Claimant's level of contribution to the Covered Action and Related Action." See <https://www.sec.gov/rules/other/2021/34-91933.pdf>.

IV The SEC noted that "[s]trict application of the deadline would result in undue hardship to [the claimant], particularly in light of [the claimant's] significant contributions to the successful enforcement

of the Covered Action and certain unique obstacles faced by" the whistleblower. See <https://www.sec.gov/rules/other/2021/34-92086.pdf>.

✓ See <https://www.sec.gov/rules/other/2020/34-89002.pdf>.

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