

\$104M Whistleblower Award — A Sign Of Things To Come

Law360, New York (December 06, 2012, 10:19 AM ET) -- A recent \$104 million whistleblower award indicates that government enforcement agencies are taking advantage of the substantial bounty provisions found in recent legislation in an effort to better discover and punish corporate fraud. The award to a banker-turned whistleblower who helped the United States government uncover conduct in which the Swiss bank UBS helped its American clients avoid taxes is also likely to motivate future whistleblowers.

This means that public companies need to reassess the adequacy of current compliance and reporting systems, create a working environment in which employees are inclined to first report issues internally, and investigate complaints quickly in order to determine whether self-reporting to the government is appropriate.

In what is believed to be the largest-ever whistleblower payout to an individual, Bradley Birkenfeld, a former UBS banker, will receive a massive \$104 million award from the Internal Revenue Service in return for his cooperation with U.S. authorities. First coming forward in 2007, Birkenfeld provided prosecutors with detailed descriptions of how UBS, Switzerland's largest bank, functioned as a tax haven for wealthy Americans. His tips paved the way for a 2009 settlement between the U.S. government and UBS under which the bank admitted to fostering tax evasion from 2000 to 2007, agreed to turn over the account information of over 4,000 U.S. clients, and paid \$780 million in penalties.

Since then, over 35,000 Americans have participated in amnesty programs in which they disclose and repatriate undeclared offshore accounts, resulting in over \$5 billion being paid to the U.S. government in back taxes, interest and penalties.

The Statutes

In 2006, Congress passed a tax whistleblower statute in the hopes of reducing tax fraud and increasing tax recovery for the U.S. government. Under this law, whistleblowers are entitled to 15 percent to 30 percent of proceeds collected. Birkenfeld's \$104 million award is 26 percent of the \$400 million in tax paid by UBS to the IRS as a result of the 2009 settlement.

Although Birkenfeld himself received a 40-month prison term in 2009 for his part in UBS' tax evasion schemes, he is not disqualified from collecting his bounty because the IRS Whistleblower Program only prohibits awards to individuals who "planned and initiated the actions that led to the underpayment of tax." This is in contrast to the comparable provision in the Dodd-Frank Act, which is applicable to securities fraud whistleblowers and states that "no award ... shall be made ... to any whistleblower who is convicted of a criminal violation related to" a securities enforcement proceeding in which the sanctions are collected.

Although the \$104 million Birkenfeld award was made as part of the IRS Whistleblower Program, this recent enormous payout could be a sign of things to come for other whistleblower programs, particularly the Dodd-Frank program, which is modeled after the IRS' bounty regime and reaches a much broader range of conduct and issues. Plaintiffs' attorneys have been educating employees about the whistleblower bounty program, and most observers predict a dramatic increase in whistleblower complaints and lawsuits.

The SEC announced in November that it received 3,001 whistleblower tips during fiscal year 2012, a rate of approximately eight tips per day. In August of 2012, the SEC announced that it made the first payout under its year-old whistleblower program to an unidentified person who helped stop a multimillion-dollar financial fraud. Although this first Dodd-Frank award was relatively small — \$50,000 — the program is still young, and there has been little time to complete an investigation of a major case.

In the coming years, after complex cases have been fully investigated, we can likely expect to see much larger payouts more on par with the Birkenfeld award. Indeed, the SEC reported in its annual whistleblower program report that there were 143 enforcement judgments and orders issued during fiscal year 2012 alone that potentially qualify for whistleblower awards.

Minimizing the Chance of Whistleblowers

In light of recent whistleblower awards and the public recruiting efforts of plaintiffs' law firms, companies should expect an increase in whistleblower activity. Companies with compliance programs that effectively prevent major violations, and identify and address violations that do occur, may be able to avoid many of the problems — and costs — that can result from those seeking to cash in on whistleblower bounties.

Employers subject to federal securities laws should examine and reassess the adequacy of existing compliance and reporting systems. Moreover, employers should train their managers to be receptive and responsive to employee complaints so that potential whistleblowers have an effective way to communicate concerns, and thus will be more inclined to report internally before going to the SEC.

Employers should also ensure that they have sufficient reporting channels in place so that complaining employees do not have to go through the individual or individuals who are the subject of the complaint. Finally, even if employees do report internally first, companies should investigate quickly in order to determine whether self-reporting to the government is appropriate.

--By Diana K. Lloyd, Michael T. Gass, R.J. Cinquegrana and Stuart M. Glass, Choate Hall & Stewart LLP

Diana Lloyd and R.J. Cinquegrana co-chair the government enforcement & compliance practice group at Choate Hall & Stewart in Boston. Michael Gass chairs the firm's securities litigation & corporate governance group in Boston and Stuart Glass is a partner in the group.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2012, Portfolio Media, Inc.