A Newsletter from Chicago Underwriting Group, Inc.
Underwriters of D & O and Professional Liability Insurance

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In this issue … we catch up with the federal whistleblowing program after its first full year, we note some helpful guidance on the FCPA offered by two federal agencies, and remind producers of our underwriting appetite.

THE DODD-FRANK WHISTLEBLOWER PROGRAM: YEAR 1

Introduced as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the provisions setting up a whistleblowing program for insiders to "blow the whistle" on corporate transgressions attracted much public attention. The topic was reviewed in this newsletter in March 2011. The act required the setting up of an Office of the Whistleblower (OWB) within the Securities and Exchange Commission (SEC) to administer the program.

Mandated to produce annual reports to Congress at the end of the OWB fiscal year (October 1 - September 30), the OWB's first report in 2011 covered just a few weeks due to the delay in finalizing its rules of operation. This means that the 2012 fiscal year report delivered in November 2012 was the first to cover a full twelve-month period.

THE 2012 TALLY

During fiscal year 2012, only one whistleblower award was paid out, for an amount just under $50,000. The SEC had obtained court-ordered sanctions of more than $1,000,000, but only around $150,000 had been collected. The award therefore was calculated at 30% of that amount, as prescribed by the act. When, and if, more money is collected from the transgressor, the whistleblower will continue to receive 30% of the additional funds.

During the course of 2012, the OWB received 3,001 "tips, complaints and referrals" from the public.

The OWB publicizes a list of SEC enforcement actions that may qualify for a whistleblower award—but only insofar as the penalties from those actions exceed the $1,000,000 eligibility threshold for whistleblowing claims. In fiscal 2012 there were 143 such actions, but the OWB is careful to state that inclusion in this list: "…means only that an order was entered with monetary sanctions exceeding $1 million. By posting a Notice … we are not making any determinations either that (i) a whistleblower tip, complaint or referral led to the [SEC] opening an investigation or filing an action with respect to the case or (ii) an award to a whistleblower will be paid in connection with the case."

Consequently, there is no way of knowing how many of those 143 actions were triggered by whistleblowers: it could be almost all, or almost none. The OWB 2012 report also points out—albeit in a footnote—that the identity of the first and any future successful whistleblowers must be kept confidential, as required by Dodd-Frank, though there are some exceptions to this rule.

COMMENT

With the first full year under its belt, the OWB's record appears not to have justified the fears of the anti-whistleblowing lobby, which predicted a rampant and costly culture of corporate insiders spilling the beans on their employers. The actual tally of 3,001 public tips is a long way short of the 30,000 envisioned when the rules for the OWB were being promulgated. The one award made no dent in the assets of the fund set up to provide for payments, indeed it made hardly any dent in the $757,248 investment income earned by the fund on its capital balance, which closed the year at a healthy $453,429,825.

Of course, it is too soon to pronounce a verdict on the Dodd-Frank whistleblowing program, though the absence of data directly linking a tip with an ensuing SEC action is a significant impediment to evaluating the program's success. A single successful claim in 12 months might indicate that corporate conspirators are becoming more adept at keeping things secret, or maybe the extent of misbehavior is not as widespread as some believed; it could also simply reflect a time lag in bringing cases to their conclusion. A series of large awards could change things, but following a year when the publicity generated by the program will not likely be repeated, the OWB's bark currently appears worse than its bite.

THE FCPA: THE GOVERNMENT OFFERS SOME HELP

The federal Foreign Corrupt Practices Act (FCPA) has been mentioned in this newsletter and by other commentators as a growing source of potential litigation against corporate directors, officers, and their employers. The SEC, which along with the federal Department of Justice (DOJ) is responsible for policing the FCPA, created a special unit in 2010 devoted to FCPA enforcement.

Such SEC focus has historically not been in evidence: in the twenty-two years from 1979 through 2000 there were a total of seven SEC enforcement actions relating to the FCPA; compare that with the fifteen actions in both 2010 and 2011, although in 2012 the pace slowed a little to ten. It certainly appears that the federal authorities are now addressing FCPA violations with a zeal that might have been lacking from 1987 through 1995 (zero enforcement actions).

It is therefore noteworthy that in tandem with their enforcement offensive, the SEC and the DOJ have recently revealed a more benign side to their activities. In the middle of November of last year, the SEC and the DOJ jointly released a Resource Guide to the U.S. Foreign Corrupt Practices Act. This document, in its own words "… is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities."

Included in its wide-ranging contents are instructive hypothetical scenarios, as well as anonymous examples of actual case resolutions. Perhaps seeking to soften its image as a relentless pursuer of U.S. companies operating overseas, this publication appears to be a significant effort to help educate and guide American businesses through the potential quick sands of foreign involvement. Companies that might be impacted by the FCPA should find some value in its 120 pages. ❖

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