

Client Alert

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SEC Publishes Annual Report to Congress on Whistleblower Program

The Securities and Exchange Commission (SEC) recently published its annual report to Congress on the agency's whistleblower program. This whistleblower program has become a centerpiece of the SEC's enforcement program. The report to Congress provides some useful data for companies and registered entities that we summarize below.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) created a new SEC bounty program for whistleblowers. Under the SEC's rules, the agency is authorized to pay awards to whistleblowers that provide the SEC with original information about a securities law violation that led to a successful SEC enforcement action resulting in monetary sanctions over \$1 million. The size of the award can range from 10 percent to 30 percent of the amount recovered in the enforcement action, and the SEC has considerable authority to determine the amount of the whistleblower bounty within that range. The rules also broadly prohibit retaliation against whistleblowers and require the SEC to maintain the anonymity of the whistleblower's identity. Due to the rules protecting the confidentiality of the whistleblower's identity, the SEC generally provides little information about individual whistleblowers.

The Dodd-Frank Act requires that the SEC provide an annual report to Congress about the progress of the whistleblower program. The most recent report covers the 2014 fiscal year, which ran from October 1, 2013, to September 30, 2014. Some of the most interesting data from the report includes the following.

- *How Many Tips Have Been Submitted?* In FY 2014, the SEC received 3,620 whistleblower tips, an increase over 3,238 tips in FY 2013 and 3,001 tips in FY 2012. The SEC's whistleblower office also returned over 2,731 calls from members of the public during the past fiscal year. By comparison, the SEC brings about 600 to 700 new enforcement cases each year on average, though it investigates many more cases that do not lead to formal charges.
- *How Many Awards Have Been Granted?* Nine of the SEC's 14 awards authorized thus far under the new whistleblower rules were made during FY 2014.
- *What Makes Tips Successful?* Although the SEC cannot provide specific information about individual whistleblowers, it indicated that there are commonalities among the tips or complaints submitted by successful whistleblowers. Among other things, the information provided by each award recipient was specific in that the whistleblower identified particular individuals involved in the fraud, pointed to specific documents that substantiated their allegations, or explained where such documents could be located. In some instances, the SEC also indicated that a whistleblower identified specific financial transactions that evidenced the fraud. Each of the successful whistleblowers was contacted by SEC enforcement staff and provided additional information or assistance to the staff during the course of the SEC's investigation.
- *What are the Most Common Tips?* There is no one type of complaint that is dominant, and the SEC has received tips involving a very broad spectrum of allegations. The highest numbers of whistleblower complaints involved corporate disclosures and financial reporting, offering frauds,

market manipulation, insider trading and alleged violations of the Foreign Corrupt Practices Act. But the SEC also indicated that a very large number of complaints do not neatly fit into any one category.

- *Who is Most Likely to be a Whistleblower?* To date, over 40 percent of the individuals who have received awards were current or former company employees. Twenty percent of the award recipients were contractors or consultants. The remaining whistleblowers were aggrieved investors, industry professionals, or had a personal relationship of some kind with one of the defendants.
- *Where are Whistleblowers Located?* During FY 2014, the SEC received whistleblower complaints from individuals in all 50 states, as well as from the District of Columbia and Puerto Rico. The highest number of tips originated from California, Florida, New York, and Texas in FY 2014. Since the beginning of the whistleblower program in 2011, the SEC has received whistleblower tips from individuals in 83 foreign countries. During FY 2014, the SEC received whistleblower complaints from individuals in 60 foreign countries. The highest number of foreign whistleblower tips in FY 2014 came from individuals in the United Kingdom, India, Canada, China, and Australia.
- *Did Whistleblowers Report Internally?* Notably, of the award recipients who were current or former employees, over 80 percent raised their concerns internally to their supervisors or compliance personnel before reporting their information of wrongdoing to the SEC. In these cases, the individuals went to the SEC only after reporting the information internally because they believed the company did not take the report seriously or was not taking sufficient steps to address the suspicious conduct.
- *How Many Requests for Awards Have Been Rejected?* In addition to denying 196 frivolous claims for awards submitted by one individual, the SEC also has issued orders denying 19 claims for whistleblower awards submitted by other individuals, with 12 of those denials being issued during FY 2014. The three primary reasons the SEC has cited for denying a claim include: (1) the claimant's information was not "original" information because it was not provided to the SEC for the first time after July 21, 2010, the date of enactment of the Dodd-Frank Act; (2) the claimant failed to submit his or her application for award within 90 calendar days of the SEC's posting of public notice; and (3) the claimant's information did not lead to the successful enforcement action because it did not cause SEC enforcement staff to open the investigation or significantly contribute to the success of the action. The SEC anticipates that over time, fewer claims will be denied on the basis that the information does not qualify as "original" information because it was not provided for the first time after July 21, 2010.

As the SEC indicated in its report, more than 60 percent of whistleblowers were employees, contractors or consultants to companies. Moreover, some 80 percent of whistleblowers first went to their employers, turning to the SEC only after they believed their reports were not satisfactorily resolved. We continue to recommend that companies maintain robust and credible internal reporting systems as the best way to engage potential whistleblowers. The SEC's data demonstrates that companies are well served when they set the appropriate "tone at the top" and operate internal reporting programs that employees view as objective and trustworthy.

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