

SEC Whistleblower Program Releases 2019 Annual Report

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SEC Whistleblower Program's Continued Success in 2019

The SEC Whistleblower Program's 2019 [Annual Report](#) to Congress reveals that [SEC whistleblower awards](#) have proven to be successful in protecting investors and promoting market integrity. Since the program's inception, whistleblower tips have enabled the SEC to recover more than [\\$2 billion](#) in monetary sanctions from wrongdoers, including more than \$1 billion in disgorgement of ill-gotten gains and interest, of which almost \$500 million has been, or is scheduled to be, returned to harmed investors.

The report also indicates that the SEC Whistleblower Program is continuing to attract a high volume of tips, some of which have enabled the SEC to halt securities frauds early and minimize investor losses. In fiscal year 2019, the SEC received more than 5,200 tips, the second-highest number of tips received in a fiscal year and a 74 percent increase since the beginning of the program. And during fiscal 2019, the SEC paid whistleblower awards totaling \$60 million. Nearly a decade after Congress enacted the Dodd-Frank Act, the SEC Whistleblower Program has proven to be a "[game changer](#)" for the Commission, providing a source of "high-quality information regarding potential securities laws violations promptly to the Commission, which in turn, helps the Commission better protect investors and the marketplace."

SEC Whistleblower Program

Under the [SEC Whistleblower Program](#), the SEC will issue awards to whistleblowers who provide original information that leads to enforcement actions with total monetary sanctions in excess of \$1 million. A whistleblower may receive an award of 10 to 30 percent of the total monetary sanctions collected. The [largest SEC whistleblower awards to date](#) are \$50 million, \$39 million and \$37 million.

The SEC Whistleblower Program also protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower's identity. Whistleblowers can even submit a tip [anonymously](#) to the SEC if represented by an attorney in connection with their tip.

To learn more about the SEC Whistleblower Program, download the eBook [SEC Whistleblower](#)

Highlights of the SEC Whistleblower Program's 2019 Annual Report to Congress

Highlights of the 2019 annual report of the SEC Whistleblower Program include:

- Approximately 85 percent of award recipients raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.
- Seven award recipients to date have received payments based, in part, on collections made in related criminal or other qualifying related actions.
- Approximately 68 percent of the whistleblowers that received awards provided original information that caused the SEC to open an investigation or examination, and approximately 32 percent received awards because their original information significantly contributed to an already-existing investigation or examination.
- Approximately 69 percent of the award recipients to date were current or former insiders of the entity about which they reported information of wrongdoing to the SEC.
- The SEC continues to enforce Rule 21F-17, which bars companies from impeding communications with the Commission. Earlier this month, the SEC brought an [action against the perpetrators of a fraudulent securities offering](#) for their attempt to resolve investor allegations of wrongdoing by conditioning the return of investor money on the investors signing agreements prohibiting them from reporting potential securities law violations to law enforcement.
- Retaliation protection remains a key tenet of the whistleblower program. The Supreme Court's ruling in *Digital Realty v. Somers* has narrowed the scope of Dodd-Frank whistleblower protection, but pending legislation in Congress would clarify that the Dodd-Frank Act's anti-retaliation provision protects internal disclosures. In July 2019, the House passed the [Whistleblower Protection Reform Act of 2019 \(H.R. 2515\)](#) by an [overwhelming bipartisan majority of 410-12](#) in July 2019. Recently Senators Baldwin, Durbin, Ernst, and Grassley introduced the [Whistleblower Programs Improvement Act \(S. 2529\)](#), which would protect corporate whistleblowers who report potential securities or commodities fraud to their employers and expedite the processing of applications for whistleblower awards.

Assessing the SEC Whistleblower Program

As we approach the tenth anniversary of the enactment of Dodd-Frank Act, the SEC is warranted in touting its Whistleblower Reward Program as a success — whistleblower tips have led to the recovery of \$2 billion in monetary sanctions and returned \$500 million to defrauded investors. And while difficult to quantify, the program has had a profound impact on corporate compliance by encouraging, if not forcing, companies to address internal whistleblower disclosures. Knowing that whistleblowers have a financial incentive to report fraud to the SEC, registered entities no longer have the option to

disregard internal disclosures of securities fraud or other violations of the federal securities laws. But Congress and the SEC should assess whether the program could be more effective. Some of the issues to consider include:

- More than 33,000 whistleblowers have filed tips with the SEC and 70 whistleblowers have received an award. Even assuming that many tips are frivolous and concern matters outside the SEC's jurisdiction, is the SEC failing to effectively investigate credible whistleblower tips and thereby failing to protect investors?
- Does the threat of retaliation (including blacklisting) deter whistleblowers from coming forward? What steps should be taken to strengthen protections for whistleblowers? At a minimum, Congress should promptly enact the [Whistleblower Programs Improvement Act](#) (S. 2529), which clarifies that whistleblowers disclosing potential violations of federal securities laws to their employers are protected against retaliation.
- The [2019 Annual Report of the Division of Enforcement](#) states that financial fraud and issuer disclosure cases took, on average, 37 months from opening to filing. These investigations are complicated and "take substantial time to complete for many reasons, including the volume of documents and witnesses [that the SEC] must examine and the need to obtain evidence from multiple parties." Would the SEC be more effective in enforcing securities laws if it increased collaboration with whistleblowers and their counsel, akin to the public-private partnership that the Department of Justice (DOJ) has employed in prosecuting False Claims Act cases? DOJ's collaboration with whistleblowers has yielded more than \$40B in fraud recoveries and unmasked fraud schemes that would otherwise evade detection. At a time of limited enforcement resources, the SEC should explore options to facilitate increased collaboration with whistleblowers and their counsel.
- The SEC's budget has essentially been frozen for years, resulting in a multi-year hiring freeze. Staffing levels in the Enforcement Division for fiscal year 2019 are nearly 10 percent lower than fiscal year 2016. As the SEC states in its most recent [budget justification](#), the Enforcement Division "must be adequately staffed to address increasingly complex financial products and transactions, handle the increasing size and complexity of the securities markets, identify emerging threats, take prompt action to halt violations, and recover funds for the benefit of harmed investors." The SEC receives approximately 20,000 tips, complaints, and referrals per year, including around 5,000 tips submitted to the SEC Office of the Whistleblower. At a June 2019 House Financial Services examining proposals to strengthen enforcement against securities law violators, former SEC Deputy Chief Litigation Counsel Stephen J. Crimmins pointed out that the "SEC spends no tax dollars" (it is funded from registration fees) and the Dodd-Frank Act contemplated a budget for the SEC that is more than \$500 million above its current budget. As Mr. Crimmins notes "[i]t is just plain wrong to go cheap on investor protection, fair and orderly trading markets, and capital formation in the world's largest and most important economy." Congress should authorize a significant increase in the SEC's budget, which would not require the use of taxpayer dollars.
- Are the SEC and the PCAOB sufficiently policing the audit industry? As Jordan Thomas observes in his recent article [Investors Beware: Some of Those Watchdogs? They're Lapdogs](#), auditors are failing to perform their critical mission of verifying the accuracy of financial statements and determining that public companies maintain effective internal controls. The SEC's enforcement action against KPMG in fiscal year 2019 revealed widespread failings, including a scheme involving the theft of confidential information from the

PCAOB concerning upcoming inspections. If the gatekeepers are riddled with conflicts and more concerned with growing revenue than with identifying accounting fraud, shouldn't the SEC take a more active role in policing accounting fraud?

- The annual report of the SEC Whistleblower Program reveals that approximately 85 percent of award recipients that worked at the entity about which they reported information of wrongdoing to the SEC raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms before disclosing the information to the SEC. Does that fact suggest that corporate compliance programs are not adequately addressing whistleblower tips?
- Due to a lack of resources and the many challenges inherent in making whistleblower award determinations, whistleblowers wait three years, if not longer, for the SEC Office of the Whistleblower to make an award determination (after waiting three or four years for the SEC to act on the whistleblower's tip). Will this delay potentially dissuade whistleblowers from coming forward, and therefore should the SEC Office of the Whistleblower be authorized to fund its operations from the Investor Protection Fund (rather than from the Enforcement budget) to address the large backlog of award applications?
- Some Commissioners have expressed concern that civil penalties impose costs on shareholders and have carried out their pledge to reduce, or in some cases, reject penalties recommended by Enforcement Staff. Do the reduced penalties fail to dissuade fraudsters? Indeed, isn't this arguably an opportune time to commit fraud? The SEC is not likely to investigate the fraud (it lacks sufficient resources to investigate most of the 20,000 tips it receives annually) and even if the SEC opens an investigation, it will take years for the SEC to take any action and the penalty is likely to be a slap on the wrist. From the perspective of some Commissioners, diminishing SEC enforcement removes obstacles to innovation and capital formation. But what is the cost of weak enforcement? Prior periods of weak SEC enforcement resulted in massive corporate fraud that caused retail investors to incur tremendous losses and reduced capital formation. Better Markets estimates the 2008 financial crash and the economic catastrophe it caused will cost the U.S. more than [\\$20 trillion](#). Commissioner Peirce spends a lot of time making speeches throughout the country and abroad belittling former Chair White's "broken windows" approach to enforcement and advocating a light touch approach to Enforcement. In a [recent speech](#), she advocates relying on market participants to self-regulate, and she often notes that the SEC is not an enforcement agency. Although Commissioner Peirce does not speak for the entire Commission, what is the impact of a Commissioner repeatedly making public statements advocating for weak enforcement? Should the SEC instead own up to its role in precipitating the financial crisis and vow not to be asleep at the wheel again?

In less than a decade, the SEC Whistleblower Program has proven an effective tool for the SEC to protect investors and promote market integrity, but the program could be far more effective if the SEC were to increase collaboration with whistleblowers and their counsel and if the SEC had sufficient resources to carry out its mission.

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