

Anonymous Whistleblowing: Does the SEC Whistleblower Program Protect a Whistleblower's Identity?

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Anonymous Whistleblowing to the SEC

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. Unlike other whistleblower-reward programs, the SEC's program allows whistleblowers to submit tips anonymously (if represented by an attorney). While this is a critical feature of the program, many SEC whistleblowers are uncertain about what **exactly** anonymous whistleblowing means. Indeed, for many whistleblowers it is imperative that their identity remain confidential when submitting information to the SEC.

Based on our experience representing SEC whistleblowers both domestically and internationally, we have compiled frequently asked questions about anonymous whistleblowing to the SEC, including the following questions:

- Can I still receive an award if I submit a tip anonymously?
- How will my attorney submit an anonymous tip on my behalf?
- How could an anonymous tip potentially expose me as the whistleblower?
- Are there any disadvantages to anonymous whistleblowing?
- Will the SEC ever know my identity if I submit a tip anonymously?

Prior to submitting a tip to the SEC, whistleblowers should assess the risks entailed in whistleblowing and options to mitigate those risks.

Can I still receive an award if I submit a tip anonymously?

Yes, but only if you have an attorney represent you in connection with both: (1) your submission of information; and (2) your claim for an award. According to the SEC Whistleblower Office's 2016 Annual Report to Congress, almost a quarter of the award recipients reported anonymously to the SEC Whistleblower Office through an attorney. Notably, approximately half of the award recipients were represented by an attorney when they initially submitted their tips to the SEC Whistleblower Office.

How will my attorney submit an anonymous tip to the SEC on my behalf?

The [SEC Form TCR](#) (Tip, Complaint, or Referral) is the form whistleblowers and their attorneys use to submit tips to the SEC Whistleblower Office. When a whistleblower submits a tip anonymously through an attorney, the whistleblower is not required to put his or her name on the form. Rather, the whistleblower's attorney will provide their contact information and will be the SEC's point of contact for the submission. In addition, the attorney will be required to, among other things, certify that they:

- Reviewed the whistleblower's submission for completeness and accuracy;
- Verified the whistleblower's identity by viewing his or her valid unexpired government issued identification (e.g., driver's license, passport);
- Obtained the whistleblower's consent to disclose his or her name to the SEC if there are concerns that the whistleblower may have knowingly and willingly made false statements or used false documents in the submission; and
- Retain an original copy of the TCR, with Section F signed by the whistleblower.

Section F of the Form TCR is the whistleblower's declaration that the submission is "true, correct and complete to the best of my knowledge, information and belief." Importantly, whistleblowers sign this declaration under the penalty of perjury. Whistleblowers should consult with their attorney if they have any concerns about the declaration.

How could an anonymous submission to the SEC potentially expose me as the whistleblower?

The documents or information contained in a whistleblower's submissions could potentially expose a whistleblower's identity. As such, whistleblowers and their attorneys should first assess whether the benefit of providing the evidence outweighs the risk of exposing the whistleblower's identity. If a whistleblower chooses to provide the evidence, the whistleblower should explicitly identify it in Section D, Part 11 of the Form TCR and explain how the evidence could reveal the whistleblower's identity if disclosed to a third party.

Notably, even when a whistleblower submits potentially compromising evidence, the SEC is required to shield the whistleblower's identity. Specifically, Section 21F(h)(2) of the Exchange Act requires, with certain exceptions, that the SEC "shall not disclose any information, including information provided by a whistleblower to the [SEC], which could reasonably be expected to reveal the identity of a whistleblower." Thus, even when the SEC obtains evidence that could expose a whistleblower's identity, the SEC is required to go out of its way to protect the identity of the whistleblower.

The SEC's commitment to protecting whistleblower confidentiality is routinely demonstrated when it announces an award determination and does not provide any information about the whistleblower. Indeed, the SEC does not even identify the enforcement action to which the whistleblower's disclosure contributed. For example, when the SEC announced the largest award to date, [more than \\$30 million](#) to an anonymous whistleblower, the SEC's press release merely mentioned that the award was given to a "whistleblower living in a foreign country" who "provided key original information that led to a successful SEC enforcement action."

Are there any disadvantages to anonymous whistleblowing?

Anonymous whistleblowing offers many obvious benefits, such as protecting whistleblowers from retaliation or harm to their career. But there can be some minor disadvantages.

When Submitting the Form TCR

Disclosing fraud to the SEC anonymously may limit the type of evidence that can be provided to the SEC. For example, a whistleblower may be concerned that certain documents or information that prove the fraud may also reveal their identity. Whistleblowers must weigh the risk of exposing their identity to the SEC (as mentioned, the SEC is required by law to keep the information confidential) with the risk that the SEC will not act on their tip. Since 2011, the SEC Whistleblower Office has received over 18,000 tips from whistleblowers. As the SEC has limited investigative resources, typically it will pursue a tip only where it receives specific, timely, and credible information about federal securities laws violations. In certain circumstances, a detailed and credible tip could potentially reveal the whistleblower's identity to the SEC.

For example, a disclosure from a senior-level corporate insider, such as an executive, can lend credibility to the tip because senior company officials often know who at the company has authorized or facilitated a fraud scheme. But providing details about a whistleblower's background or position within a company could expose the whistleblower's identity. Again, the whistleblower should seek advice to weigh the risk of exposing their identity to the SEC against risk that the SEC will not act on their tip.

When the SEC Investigates a Whistleblower's Tip

If a whistleblower and the whistleblower's attorney [draft a tip that grabs the SEC's attention](#), the SEC will often request to have a telephone interview with the whistleblower (who can remain anonymous or deny the request) or the whistleblower's attorney to gain a better understanding of the federal securities laws violations. Furthermore, the SEC may request additional documents or information to confirm the alleged violations. If the SEC is persuaded by the interviews and information, it will assign the tip to one of its 11 regional offices, an Enforcement specialized unit, or an Enforcement Associate Director group located in the SEC's Headquarters.

Whistleblowers can be very helpful during this back-and-forth with the SEC, especially whistleblowers who have intimate knowledge and documentation of the violations. Notably, the SEC may increase a whistleblower's award based on the assistance provided by a whistleblower. But responding to a request from the SEC for additional information could inadvertently reveal information that exposes the whistleblower's identity.

Will the SEC ever know my identity if I submit a tip anonymously?

Yes, however, whistleblowers will only have to disclose their identity (absent the exceptions listed above) at the end of the whistleblowing process when applying for an award. In the application for an award, known as the [Form WB-APP](#), the whistleblower must disclose his or her identity to the SEC so that the Commission can determine whether the whistleblower is “eligible” for an award under the program. [Certain whistleblowers, such as key compliance personnel, are not eligible for awards, unless an exception applies.](#) Even at the time of an award, however, a whistleblower’s identity is not disclosed.

In sum, the SEC Whistleblower Program offers whistleblowers the opportunity to disclose information anonymously and there are safeguards in place throughout the process to protect whistleblower confidentiality. But in certain circumstances, revealing a whistleblower’s identity to the SEC can increase the likelihood that the SEC will pursue the tip.

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National Law Review, Volume VII, Number 178

Source URL: <https://natlawreview.com/article/anonymous-whistleblowing-does-sec-whistleblower-program-protect-whistleblower-s>