

SEC  
Whistleblower  
Advocates

# Reporting Without Regrets:

## *The SEC Whistleblower Handbook*

In addition to the information contained in this Handbook, we encourage readers to visit our website [here](#) to review Frequently Asked Questions about the program, the reporting process and our Firm.



# Introduction

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**At SEC Whistleblower Advocates, we work to protect and empower SEC whistleblowers, so they can successfully report securities violations—without personal or professional regrets. As first-hand witnesses to wrongdoing, whistleblowers are a formidable opponent to corruption. Their courageous actions safeguard jobs and investors, ensure fair markets and facilitate capital formation. When courageous individuals speak out against wrongdoing, we stand up, we step closer and use every tool in our arsenal to make their voices heard.**

**Reporting Without Regrets: The SEC Whistleblower Handbook is a guide to this revolutionary process.**

## **The Birth of the SEC Whistleblower Program**

More than 10 years ago, following a global financial collapse spurred by serial wrongdoing, the country reeled and debated how to break the cycle of fraud and corruption and restore investor confidence. Financial watchdogs agreed on two fundamental truths: the status quo was failing and law enforcement could not effectively and efficiently police the marketplace without the help of individuals with actionable intelligence.

In response to this crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, one of the most significant financial reforms since the Great Depression. Within its 2,000 pages was the charge to establish an investor protection initiative, which emerged as the SEC Whistleblower Program. Its three pillars—anonymous reporting, substantial monetary bounties, and significant employment protections—shaped a first-of-its-kind paradigm to encourage individuals to report suspected violations of the federal securities laws.

At Labaton Sucharow, we work to protect and empower SEC whistleblowers so they can successfully report securities violations—without personal or professional regrets. Whistleblowers are a potent and formidable challenge to corporate corruption. Their courageous actions safeguard jobs, investors, corporate reputations, ensure the fair operation of markets, and create an important deterrent to future malfeasance.

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**When brave individuals speak out against wrongdoing, we use every tool in our arsenal to make their voices heard.**

# The Program At-A-Glance

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To qualify for a monetary award, an individual or group of individuals must voluntarily provide the SEC with original information that results in a successful enforcement action in which the SEC collects over \$1 million in sanctions. Depending on various factors, the whistleblower may receive a financial reward between 10% - 30% of the sanctions collected.

With few exclusions or qualifications, any individual or group of individuals, regardless of citizenship, can be an SEC whistleblower. In fact, a whistleblower doesn't have to be employed by the entity at issue. The program effectively deputizes nearly every individual to be the Commission's eyes and ears, providing early and actionable intelligence to the SEC.

Given the significant financial incentives, employment protections and the ability to report anonymously, it is no surprise that the SEC Whistleblower Program has proven to be a game changer, one that continually broadens its reach, gains momentum and empowers more and more truth-tellers. Since the program's inception, the SEC has received over 33,000 whistleblower tips from individuals in all 50 states and 123 countries, and has awarded more than \$387 million to whistleblowers. Perhaps most impressively, successful enforcement actions spurred by whistleblower tips have resulted in more than \$2 billion in total monetary sanctions, including more than \$1 billion in disgorgement of ill-gotten gains and interest. Of this, more than a billion dollars has been collected because of our clients whistleblower tips. And almost half a billion dollars has been, or will be returned to harmed investors.

These figures are staggering, but the intangible impact even more so: whistleblowers restore public faith in the markets. They are the counterweight, the assurance that truth is far more powerful than greed. Behind these impressive results, stand everyday people willing to take a bold step forward, to be the outsider and the anti-hero, no matter the size of Goliath and his balance sheet.

But what assurances are provided to the whistleblower?



**\$404M**

BALANCE OF INVESTOR  
PROTECTION FUND FROM  
WHICH AWARDS ARE PAID  
(AS OF FY 2019)



**\$387M**

SEC WHISTLEBLOWER  
AWARDS PAID TO DATE



**5,212**

NUMBER OF  
SEC WHISTLEBLOWER  
SUBMISSIONS IN FY 2019

# Anonymous Reporting

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**The ability to report possible misconduct anonymously is one of the most important pillars of the SEC Whistleblower Program. In the past, fear of retaliation and blacklisting deterred corporate whistleblowers from reporting wrongdoing in the workplace. Corporate cultures of silence and complicity thrived and intimidated those who would speak out against misconduct. Law enforcement and regulatory authorities were therefore often unable to detect and prosecute securities violations, especially in earlier stages.**

To anonymously report possible violations to the SEC, a whistleblower must be represented by an attorney and must provide counsel with a copy of the whistleblower submission signed under the penalty of perjury. The attorney will verify the identity of the whistleblower before submitting any information to the SEC; serve as an intermediary between the SEC and whistleblower during any investigation and related enforcement action; and advocate for the highest potential monetary award if the submission results in a successful SEC enforcement action. Prior to receiving any monetary award, for eligibility, tax and other reasons, whistleblowers must disclose their identity to the SEC. Over the years, the Commission has carefully guarded the anonymity of whistleblowers, and is required to make every effort to protect any sensitive identifying information.

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**The ability to report possible misconduct anonymously is the best protection against potential retaliation and blacklisting.**

**Case in Point:** At Labaton Sucharow, since our clients tend to be senior executives with a lot to lose, the majority file their SEC whistleblower submissions anonymously. Leveraging our decades of SEC enforcement experience, we take extra measures to further protect our clients' anonymity, including carefully considering where to file their whistleblower submissions and what supporting information and materials to provide the SEC. We also use sophisticated investigative reporting techniques to facilitate our clients' anonymous communications with SEC Staff during the Commission's investigation and any related litigations to enhance the probability of success and the size of future monetary awards.

# Employment Protections

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**While an SEC whistleblower doesn't have to be an employee, in Fiscal Year 2019, 69% were current or former corporate insiders. When the handful of SEC officials—including Labaton Sucharow partners Richard Levine and Jordan Thomas—set about drafting the key provisions of the SEC Whistleblower Program, they knew that meaningful employment protections were necessary for the long-term success of the program.**

The resulting law is clear: An employer cannot discharge, demote, suspend, threaten, harass or discriminate against whistleblowers who report possible securities violations. These protections exist regardless of whether or not the reported securities violations are proven, as long as the SEC whistleblowers reported in good faith. Importantly, the SEC has made it clear that it will use this authority to take action against employers that retaliate against SEC whistleblowers. At Labaton Sucharow, we saw this first-hand representing the first SEC whistleblower whose company, Paradigm Capital Management, was charged by the SEC with unlawful retaliation.

Importantly, in 2018, the Supreme Court ruled that an employee must report to the Commission to trigger Dodd-Frank's employment protections. The SEC has certainly demonstrated, and the Court affirmed, that the Commission is a safe channel to establish employee protections and enforce corporate compliance. Nevertheless, data continues to show that employees continue to put company loyalty ahead of self-interest: employees still report concerns internally in the first instance and only go to law enforcement after their concerns are inadequately addressed or met with retaliatory conduct. This has proven to be true in the SEC whistleblower program, including in Fiscal 2019, when the lion's share of award recipients reported their concerns first to the company.

As a practical matter, Dodd-Frank's anti-retaliation protections for whistleblowers include an automatic private right of action in federal court, without the need to exhaust administrative remedies prior to filing.

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**The SEC Whistleblower Program was designed to protect courageous whistleblowers and severely punish companies that retaliate against them.**

The remedies available to SEC whistleblowers include reinstatement to the same seniority, double back pay, and litigation costs (including attorneys' fees and expert witness fees). An employee suing under this section must file the claim no later than six years from the retaliatory conduct or three years from when the employee knew, or reasonably should have known, of the retaliatory conduct, but in no event to exceed 10 years after the date of the violation.

To qualify for these anti-retaliatory protections, the whistleblower must possess a "reasonable belief" that the information provided relates to a possible securities violation. The SEC has explained that a "reasonable belief" is a subjectively genuine belief that the information constitutes a possible violation, and that this belief is one that a similarly situated individual might reasonably possess. Furthermore, the information must demonstrate a "possible violation," which eliminates frivolous submissions from eligibility.

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## Knowing that the SEC has your back, makes doing the right thing a lot easier.

### **Enhancement of Sarbanes-Oxley (SOX) Anti-Retaliation Protections**

**Dodd-Frank also enhanced anti-retaliation protections established by SOX, expanding coverage beyond public companies to employees of affiliates and subsidiaries of publicly traded companies. This includes foreign subsidiaries and affiliates of U.S. public companies.**

Through these enhancements, Dodd-Frank now provides broad extraterritorial reach in actions brought by the SEC and the Justice Department. The SEC's whistleblower program was designed with an understanding of the nature of the global economy. In fact, a substantial award—more than \$30 million—was paid to an international whistleblower.

Since the program's initiation, the SEC has received whistleblower tips from individuals in 123 countries outside the United States. Furthermore, Dodd-Frank expands SOX coverage to employees of nationally recognized statistical ratings organizations, such as Moody's Investors Service Inc., A.M. Best Company Inc., and Standard & Poor's Ratings Service.

Finally, Dodd-Frank doubles the statute of limitations for SOX whistleblower claims from 90 to 180 days; provides for a jury trial for claims brought under SOX whistleblower protections; and declares void any "agreement, policy form, or condition of employment, including a pre-dispute arbitration agreement" which waives the rights and remedies afforded to SOX whistleblowers.

### **New Anti-Retaliation Protections for Financial Services Employees**

Congress also created the Consumer Financial Protection Bureau through Dodd-Frank and extended whistleblower protection to employees of financial products or services companies. Some examples of such companies include those that conduct the following: extend credit or services or brokers loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products (including credit counseling); or collect, analyze, maintain, or provide consumer report information or other account information in connection with decisions regarding the offering or provision of a consumer financial product or service.

Employees of such companies cannot be retaliated against for any of the following: (i) testifying or expressing the willingness to testify in a proceeding for administration or enforcement of Dodd-Frank; (ii) filing, instituting or causing to be filed or instituted, any proceeding under any federal consumer financial law; or (iii) objecting to, or refusing to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of the Bureau.

A financial services employee who experiences retaliation must file a complaint within 180 days of the retaliatory conduct with the Secretary of Labor, and may seek de novo review in federal district court within 120 days of the Secretary of Labor's determination (or 210 days after filing with the Secretary of Labor). The sole requirement for filing a claim is to demonstrate, by a preponderance of the evidence, that the protected conduct was a "contributing factor" to the retaliation. Upon such a showing, the burden shifts to the employer to show, by clear and convincing evidence, that it would have taken the same action regardless of the employee's protected activity.

# Monetary Awards

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**Since the program's inception, the SEC has awarded more than \$387 million to whistleblowers. More than 15% of that sum was paid in Fiscal Year 2019. In one covered action alone, the Commission granted \$50 million to two whistleblowers for assisting the agency in bringing a successful enforcement action charging J.P. Morgan Securities LLC and JPMorgan Chase Bank N.A. with securities violations for failing to disclose conflicts of interest to clients. One of these award recipients was a Labaton Sucharow client.**

In addition to the size of awards, their scope is compelling: More than one-fifth of award recipients were foreign nationals or resided outside of the United States when they submitted tips to the SEC.

There are four general criteria in determining who qualifies for an SEC whistleblower award. It is important to note that certain threshold requirements are set forth in the Whistleblower Program and there are certain types of individuals that are either ineligible or are subject to additional procedural requirements before they can receive an SEC whistleblower award.

## Qualifying for a Whistleblower Reward

Typically, the Whistleblower Program provides for a monetary award to any eligible individual or group of individuals (a company or other entity is not eligible), regardless of citizenship, who voluntarily provides the Commission with original information about a possible violation of the federal securities laws that leads to a successful enforcement action resulting in monetary sanctions exceeding \$1,000,000.

## What does 'voluntary' mean?

To qualify for an award as a whistleblower, the first requirement is that the individual "voluntarily provides" the information to the SEC. Information is provided voluntarily if it is provided "before a request, inquiry, or demand" for such information: (i) by the SEC; (ii) by the Public Company Accounting Oversight Board or any self-regulatory organization in connection with an investigation, inspection or examination; or (iii) in connection with an investigation by Congress, the Federal Government, or a state attorney general or securities regulatory authority. The submission also will not be considered voluntary if the whistleblower was required to provide the information to the SEC as a result of a pre-existing legal duty to the Commission, or a contractual duty owed to the Commission or to one of the other authorities enumerated in the previous sentence, or pursuant to a duty that arises out of a judicial or administrative order. Only a request, inquiry, or demand made on an individual whistleblower will be considered in connection with the question of whether a submission is voluntary.

A request, inquiry or demand on the organization for which a whistleblower is employed, for example, will have no bearing. Thus, if an employee is aware that a demand for information was made to his or her employer or that the employer is being investigated, and that employee provides the SEC with information about a possible securities violation, the submission could still be deemed voluntary. But an issue could arise if the employee provides the same information to the Commission that the Commission received as part of its investigation of the company (or would have received even if the employee had not provided the information to her employer during the investigation). That could affect the determination of whether the employee's submission led to a successful enforcement action, another required element for an SEC whistleblower award.

Another important caveat is that a submission to the SEC may be deemed voluntary, even if made after receiving a request, inquiry, or demand from the SEC, if the information was voluntarily provided to another law enforcement or regulatory authority prior to the SEC's request or inquiry.

## **What is original information?**

The second requirement for receiving an award is that the individual provide original information. To be considered original, the information must be derived from independent knowledge or independent analysis; not already known to the SEC from any other source; not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the media, unless the whistleblower was the original source for the information; and, provided to the SEC after July 21, 2010.

## **What is independent knowledge and analysis?**

The Commission defines independent knowledge as factual information in the individual's possession that is not derived from publicly available sources. Significantly, the information could be gained from experiences, communications, and observations in business or social interactions. In other words, the individual need not have first-hand knowledge of the possible violation, but could have learned of the facts from a third party.

Independent analysis is defined as an individual's own examination and evaluation of information that may be publicly available, such as financial reports, but which reveals information that is not generally known or available to the public.

There are a number of important circumstances in which the SEC will not consider information to be derived from independent knowledge or analysis. These exclusions generally apply to narrow categories of individuals, such as lawyers, consultants, and other third parties who acquire information as part of their work on behalf of a client, or company insiders who learn of the information in connection with their role in an internal investigation into wrongdoing, as well as information acquired illegally. Specifically, information is excluded in the following circumstances:

- when the information is subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2), the applicable state attorney conduct rules, or otherwise;
- the information was obtained in connection with the legal representation of a client, and the lawyer seeks to make a whistleblower submission for his or her own benefit, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2), the applicable state attorney conduct rules, or otherwise;
- the information was obtained because the individual was (a) an officer, director, trustee, or partner of an entity and was informed of the allegations by another person, or learned of the allegations in connection with the entity's internal process for identifying and reporting violations of law; (b) an employee whose duties involve compliance or internal audits, or an employee of a firm retained to perform compliance or internal audit; (c) employed by a firm retained to conduct an internal investigation; or (d) an employee of a public accounting firm and the information was obtained during an engagement;
- or the information was obtained by means determined by a United States court to violate federal or state criminal law.

There are a few important exceptions to the third category of exclusions—individuals who are insiders and third parties retained to perform legal, audit, or investigative work. This exclusion will not apply if the whistleblower has a reasonable basis to believe disclosure is necessary to prevent the entity from engaging in conduct that will cause substantial injury to the entity or the investing public, or that the relevant entity is engaging in conduct that will impede an investigation. In addition, the exclusion will not apply if more than 120 days have elapsed since the whistleblower provided the information to the entity's audit committee, chief legal or compliance officer, or his or her supervisor.

### The source must be original.

For information to be considered original, it cannot already be known to the SEC from any other source. There are two exceptions. First, the SEC will consider a whistleblower the original source of information that was previously received by the SEC from another source if that source obtained the information from the whistleblower or the whistleblower's representative in the first place (and the information otherwise satisfies the definition of original). Second, the SEC will consider a whistleblower to be the original source of information if that information derives from the whistleblower's independent knowledge or analysis and materially adds to the information already known to the Commission.

### Successful Enforcement Action

The third requirement is that the whistleblower's voluntarily provided, original information must lead to a successful enforcement action. The applicable rules set forth three circumstances constituting a successful enforcement action:

- The information provided to the Commission caused the Commission to commence an examination, open an investigation, reopen a previously closed investigation, or inquire about different conduct as part of a current investigation, and the Commission brings a successful action based in whole or in part on the original information provided;
- The original information relates to a conduct that is already under investigation by the Commission (or other federal authority) and significantly contributes to the success of an enforcement action based on that conduct; or
- The information is provided by an employee through his or her employer's internal reporting procedures before or at the same time the employee submits the information to the Commission, and the employer then provides the employee's information (or the results of an internal investigation) to the SEC, which leads to a successful enforcement action (the employee will get the full credit for providing the information to the SEC).

This last category was not in the original rules proposed by the SEC, and many comments expressed the concern that whistleblowers would completely bypass organizations' internal reporting mechanisms. This provision was therefore added, along with other procedural incentives to encourage individuals to utilize internal compliance programs, and further encourage the use of these programs in facilitating compliance with the securities laws.

In addition, the SEC will pay an award based on sanctions collected in a related proceeding brought by the Attorney General of the United States, a regulatory authority or self-regulatory organization, or a state attorney general, which is based on the same information that led to the Commission's successful enforcement action. This can include sanctions paid in non-prosecution agreements or deferred prosecution agreements entered into by the U.S. Department of Justice.

#### TOP WHISTLEBLOWER TIPS RECEIVED IN FY 2019



## Monetary Sanctions Exceeding \$1,000,000

Generally, the monetary sanctions must exceed \$1 million in a single judicial or administrative action. In some circumstances, however, the SEC will aggregate the sanctions collected in two or more proceedings if the proceedings arise out of a common nucleus of operative facts. In such cases, once this threshold is met, a whistleblower is eligible for a monetary award based upon all monetary sanctions collected in related enforcement actions—regardless of amount.

## Procedures for Filing an SEC Whistleblower Submission

There are two methods for submitting information to the SEC: (1) online using the Commission's Tip, Complaint or Referral Portal (<http://www.sec.gov>), or (2) by mailing or faxing a Form TCR to the SEC Office of the Whistleblower. The whistleblower must declare under penalty of perjury that the information contained in the submission is true and correct to best of his or her knowledge. Additionally, if the whistleblower wishes to remain anonymous, his or her submission must be made by an attorney in accordance with the same procedures just described.

While the procedures for making a whistleblower submission to the SEC are relatively simple, it is essential that they be followed correctly, or a potential whistleblower might be disqualified from receiving an award or be ineligible for the antiretaliation protections provided by Dodd-Frank. Moreover, due to the SEC's limited resources and the high-volume of tips it receives, successful SEC whistleblowers often file sophisticated and detailed submissions.

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**On behalf of our whistleblower clients, we regularly  
file encyclopedic legal and factual whistleblower submissions  
with supporting exhibits and recordings**

## Procedures for Filing an SEC Application for Award

After a successful enforcement action where the monetary sanctions exceed \$1 million is announced, the SEC will post a Notice of Covered Action on its website. To claim an award, SEC whistleblowers and their legal counsel are required to mail or fax a completed application for award, SEC Form WB-APP, to the SEC Office of the Whistleblower, within 90 calendar days of the notice date. If the whistleblower provided his or her original submission anonymously, the whistleblower must disclose his or her identity on the Form WB-APP.

As a courtesy, the SEC Staff often notifies known SEC whistleblowers or their legal counsel about the successful enforcement action and the opportunity to apply for an award. That being said, SEC whistleblowers are solely responsible for monitoring the SEC's Notices of Covered Actions, so they do not miss the deadline for filing an application for award. On behalf of our SEC Whistleblower Program clients, Labaton Sucharow regularly monitors these notices and files lengthy applications for awards that address the governing law and highlight their many significant contributions during the SEC investigation and any related prosecution.

## Determining the Amount of the Award

If all conditions are met and a whistleblower is entitled to an award, the amount of that award will be between 10-30% of the sanctions collected by the SEC or other prosecuting authority. Even if there are multiple whistleblowers, the total amount awarded to all whistleblowers will still range between 10- 30% of the sanctions, with the amount of the award for each whistleblower determined on an individual basis. The determination of the specific percentage within the range that will be used to calculate a reward is in the sole discretion of the SEC. Currently, there is no ceiling for an SEC whistleblower award.

In reaching its determination of a specific award, the SEC considers several factors unique to the circumstances of each case. The factors that may increase a whistleblower's award include:

- the significance of the provided information to the success of the action or related action, including how the information related to the action and the degree to which the information supported one or more successful claims
- the degree of assistance provided by the whistleblower to the Commission in the action or related action, including, among other things, the extent to which the whistleblower explained complex transactions and interpreted key evidence, and assisted the authorities in the recovery of the fruits and instrumentalities of the violation
- law enforcement interest in prosecuting and deterring the type of securities violation involved in the submission
- whether the whistleblower reported the potential violation internally using organizational compliance procedures

Conversely, factors that could reduce the size of a whistleblower's award are:

- the culpability or involvement of the whistleblower in the securities violation, including the whistleblower's role in and the extent he or she benefited from the violation
- whether the whistleblower unreasonably delayed reporting the potential violation
- if the whistleblower internally reported the potential violation in accordance with his or her employer's compliance program, and whether, and the extent which, the whistleblower interfered with or undermined that program.

As the above indicates, an individual will not automatically be precluded from receiving an award as a whistleblower if he or she had some culpability in the underlying violation. Generally, the extent of the culpability would merely be a factor considered by the SEC in determining the size of the award.

In cases where the maximum whistleblower award available would be \$5 million or less, the SEC has stated that it will apply a presumption to grant the maximum award to whistleblowers, as long as none of the negative factors (culpability, interference with internal reports, unreasonable reporting delay) are present.

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**Due to the SEC's limited resources, the probability of a successful enforcement action and the size of a monetary award are dramatically enhanced when whistleblower tips are supported by expert analysis and assistance.**

# Common Securities Violations

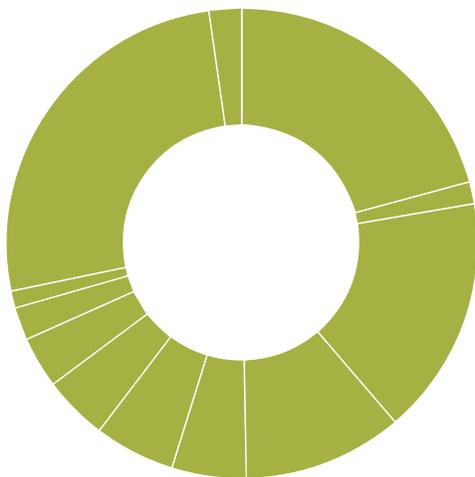
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With the prospect of large financial awards and robust employee protections provided by Dodd-Frank and the SEC Whistleblower Program, it is important that individuals know what constitutes a qualifying violation for the program.

A whistleblower may report any possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. However, for the SEC to obtain a monetary civil penalty, the relevant securities violation(s) must have occurred, or have remained ongoing, within the past five years, even if the whistleblower did not discover the possible violation until a later date.

## WHISTLEBLOWER TIPS BY ALLEGATION TYPE (AVERAGE)

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21%	CORPORATE DISCLOSURES AND FINANCIALS
2%	CRYPTO CURRENCY
16%	OFFERING FRAUD
11%	MARKET MANIPULATION
5%	INSIDER TRADING
6%	TRADING AND PRICING
4%	FCPA
4%	UNREGISTERED OFFERINGS
2%	MARKET EVENT
1%	MUNICIPAL SECURITIES AND PUBLIC PENSION
26%	OTHER
2%	NOT REPORTED

## Offering Fraud

Offering fraud generally occurs when an individual (or group of individuals) makes misrepresentations and/or omissions of material fact to potential investors in a new company.

An example of this type of fraud is when individuals will contact potential investors and attempt to induce them into investing in a new, unknown company, by making false claims about the company.

Another common type of offering fraud is a Ponzi scheme, where investors are paid returns from their own money or from the money invested by subsequent investors, rather than from any actual profit earned. The operator of the scheme induces new investors by paying unusually consistent or abnormally high returns to older investors.

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## **SEC enforcement cases don't get better with age. Tips that are over 5 years old are almost always past the statute of limitations.**

Pyramid schemes are also an example of offering fraud in which an individual or several individuals recruit investors, promising those investors large returns for recruiting other investors rather than through any real investment. At each level, the number of investors increases, creating a "pyramid." The small group of initial investors at the top requires a larger base of later investors to fund the earlier investors. The pyramid will ultimately collapse when not enough new investors are available to recruit and pay earlier investors. Pyramid schemes can appear in many forms, and are sometimes disguised as multi-level marketing companies which claim to sell a product or service, but actually only generate money through the recruiting of new members.

Offering fraud may also occur online, with fraudsters utilizing websites or social media to approach large numbers of potential investors with misinformation or false promises of guaranteed returns. In recent years, fraudsters have also harnessed blockchain technology, initial coin offering, and cryptocurrency to commit offering fraud.

### **Insider Trading**

Insider Trading refers generally to the buying or selling of a corporate security while in possession of material information about that corporation that is not known to the public. Insider trading is unlawful because trading while having special knowledge is unfair to other investors who don't have access to such knowledge. Misuse of privileged information undermines investor confidence, threatens the fair functioning of the markets, and is considered a breach of fiduciary duty.

Often, this information is obtained by corporate insiders who have access to this material information based on their position inside the organization. That insider then buys or sells the securities based on that information. Insider trading may also occur when a corporate insider "tips" the nonpublic information to someone outside of the organization, and that person then buys or sells securities. In that case both the "tipper" of the information and the "tippee" (the person receiving the information) are liable for illegal insider trading. An example of illegal insider trading is when an executive at Company A learned, prior to a public announcement, that Company A will be taken over, and bought shares in Company A knowing that the share price would likely rise.

Misappropriation is another example of illegal insider trading, where an outsider trades on inside information received because of a confidential relationship or role with the company such as those of accounting, banking, brokerage, law, or printing firms. An example of misappropriation is when Company A consults with an accountant confidentially for tax advice in advance of a merger, and the accountant subsequently executes trades based on that merger information. Another examples of illegal insider trading is when government employees or political consultants trade on confidential information they learned in the course of their employment.

The SEC conducts market surveillance using sophisticated tools to detect suspicious trades and potential illegal insider trading. The Commission also receives numerous tips regarding potential illegal insider trading from wronged investors, rival traders, and whistleblowers.

## The Foreign Corrupt Practices Act (FCPA)

The FCPA prohibits the offer, payment, or promise to pay money or anything of value—i.e., a bribe—to any foreign official in an effort to win or retain business from that foreign official's government. Under the FCPA, a bribe does not need to be paid in order to violate the law. The FCPA's anti-bribery provisions apply to a broad array of organizations and individuals including US companies and their officers, directors, employees, stockholders, and agents (including third-party agents, consultants, and others), American citizens, American nationals, American residents, and foreign corporations that trade securities in the US, and others. Those who are not explicitly covered by the FCPA may be prosecuted under it if they, or their agent, engage in furthering a corrupt payment. For example, if a foreign national were to attend a meeting in the US to arrange a bribe from a US company to someone in his government, that foreign national would be subject to prosecution under the FCPA.

It is not a violation of the FCPA, however, if (i) the payments are legal under the written laws of the country in which the payments are made; or (ii) the payment is a reasonable expenditure directly related to the conducting of business with a foreign government.

Additionally, the FCPA requires that certain accounting provisions are met by publicly traded companies in the United States. This requirement is designed to prevent the use of accounting schemes to hide bribes or other unlawful payments and to offer an accurate representation of the company's finances to shareholders and the SEC.

## Unregistered Offerings

With limited exception, offerings of securities in the U.S. must be registered with the SEC. An offering that is not registered, or that fails to meet or adhere to the requirements for exemption, constitutes a violation (and sales, or attempted sales, are a serious crime).

Non-public offerings are among the more common exceptions to the registration requirement. This exemption, sometimes referred to as the "private placement" exemption, is established by Section 4(a)(2) of the Securities Act, and generally applies to offerings in which purchasers are informed, "sophisticated investors" who have agreed not to resell the securities to the public.

Notwithstanding these general parameters, however, this exemption leaves much to interpretation, and thus a safe harbor is included in Rule 506 of Regulation D. In addition, in Rules 504-504, Regulation D sets forth some other common exceptions to registration, which generally turn on one or more of the following:

- the size/duration of the offering (e.g., an offering of \$1 million or less over a 12-month time period faces the least restrictions in qualifying for exemption);
- the means of solicitation (public advertising is often a hitch);
- the level of disclosure provided; and
- the characteristics of the investors and/or the securities.

The JOBS Act (discussed in Section I.H., supra) required certain amendments to existing exemptions and creation of new ones to make it easier, particularly for smaller companies, to raise capital without SEC registration.

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**Whistleblowers are a potent and formidable challenge to corporate corruption. Their courageous actions safeguard jobs, investors, corporate reputations, ensure the fair operation of markets, and create an important deterrent to future malfeasance.**

## **Market Events**

“Market events” refer to disruptions or aberrations in the securities markets, such as an unexpected interruption in trading on a securities exchange, a liquidity crisis or a “flash crash.”

While not all such market events represent securities violations, the SEC and other federal agencies conduct surveillance of trends and dealer and investor positions to help determine whether market events are indicative of fraudulent activities. The SEC has brought enforcement actions against exchanges and related entities where the market event was caused or exacerbated by the exchange’s failure to follow relevant SEC or internal rules.

Technological changes including the automation of equity trading and the emergence of high frequency and algorithmic trading has significantly increased the threat of disruptions and other market events. Some threats identified by the Commission as possible violations include the misuse of confidential customer order information and failures to adopt policies and appropriate safeguards against the risks of direct market access, including the risk of out-of-control automation resulting from errors from changes in computer code. The SEC has also brought several cases involving high-volume manipulative trading schemes, including manipulation techniques known as “layering” or “spoofing.” An example of this scheme is when a trader sends non-bona fide orders that he plans to cancel before they are executed in order to create false information about trading interest and prompt others to buy or sell securities at artificially high or low prices.

## **Statute of Limitations**

In civil cases, which encompass SEC enforcement actions, a statute of limitations is a law that bars a claim after a specified period, generally based on the date when the claim accrued. This requires diligent prosecution of claims that are or should be known, in order to foster predictability, accuracy and finality in legal affairs. In SEC enforcement actions, with only rare exceptions, the applicable statute of limitations is five years, beginning when the conduct giving rise to the claim occurred, not when it was discovered by authorities.

## **Restrictive Employment Agreements**

In recent years, using a variety of employment, severance and settlement agreements, companies have become more aggressive in their efforts to discourage employees from reporting violations to law enforcement and regulatory authorities. Deeply troubled by these practices, Labaton Sucharow co-led a large coalition of public interest organizations to petition the SEC to use its tremendous power to stop these bad actors. As a result, the SEC has recently brought several high-profile enforcement actions against companies that use these illegal secrecy agreements, including the landmark \$415 million case against Merrill Lynch originated by a group of Labaton Sucharow whistleblowers. The SEC found that Merrill Lynch had used “improper confidentiality provisions” in severance agreements for departing employees that prohibited them from disclosing confidential information to any outside entity without prior approval from the firm. The whistleblowers were granted an historic \$83 million in awards for their role in the landmark enforcement action.

This, coupled with the Supreme Court’s decision in Digital Realty, has had a powerful deterrent effect on employers’ efforts to come between an individual and his or her government.

## WHISTLEBLOWER TIPS RECEIVED BY THE SEC

YEAR/AMOUNT		% INCREASE OVER PRIOR YEAR
2013	3,238	
2014	3,620	11.8%
2015	3,923	8.4%
2016	4,218	7.5%
2017	4,484	6.3%
2018	5,282	17.8%
2019	5,212	-1.3%

## The Future of the SEC Whistleblower Program

Since its inception, the SEC Whistleblower Program has revolutionized the landscape of enforcement of securities violations. The nearly half a billion dollars that have been, or will be recovered through SEC enforcement actions involving whistleblowers can have life-changing effects on individuals and their families. The program also provides immeasurable societal benefits by fostering fair and orderly markets, protecting investors, employees and other vulnerable individuals.

## TOP 10 SEC WHISTLEBLOWER AWARDS

March 2018	\$50 Million
September 2018	\$39 Million
March 2019	\$37 Million
March 2018	\$33 Million
September 2014	\$30 Million
August 2016	\$22 Million
November 2016	\$20 Million
June 2016	\$17 Million
September 2018	\$15 Million
September 2013	\$14 Million

Our partners have had the pleasure of serving—for decades—in senior positions at the SEC during both Republican and Democratic administrations. In our experience, unlike financial regulation, white collar law enforcement has been a bipartisan priority for most administrations. The SEC has also made it abundantly clear that it will strike out against efforts to impede whistleblowing in any way.

# Conclusion

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The passage of Dodd-Frank and the enactment of the SEC Whistleblower Program were watershed moments in financial regulation and investor protection. The program's success is evident in the increasing number of tips, awards and sanctions from enforcement actions. However, bad actors may persist. It is vital to the safety and integrity of our markets that potential whistleblowers and their counsel familiarize themselves with the relevant statutory provisions and the rules adopted by the SEC so whistleblowers can properly and safely report and maximize their awards.

Though recent events may have dampened the notion of whistleblowing, SEC whistleblowers come forward in great numbers each year, facing numerous economic and personal risks. Their ability to be – and make others – better stewards of their organizations, the markets, and the public at large demonstrates the value of robust protections and an anonymous, incentivized reporting structure. With zero cost to the American taxpayer, in partnership with the public, the program's success is a rare and remarkable achievement.

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**The SEC has made clear it has no patience  
for discouraging whistleblowing in any way.**

## WORK WITH US

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An ultra-selective whistleblower practice. A team with a century of federal law enforcement experience, led by a principal architect of the SEC Whistleblower Program. Exclusively partners working exclusively for SEC whistleblowers. Precedent-setting whistleblower awards.

A whistleblower law firm like no other.

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In addition to the information contained in this Handbook, we encourage readers to visit our website <https://www.secwhistlebloweradvocate.com/> to review Frequently Asked Questions about the program, the reporting process and our Firm.

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Whistleblower  
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