

# Tips From SEC Whistleblower Attorneys to Maximize an SEC Whistleblower Award

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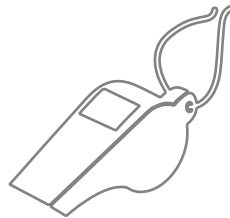
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# CONTENTS

<b>OVERVIEW OF THE SEC WHISTLEBLOWER PROGRAM . . . . .</b>	<b>1</b>
What is the SEC Whistleblower Program? . . . . .	1
Can I submit an anonymous tip to the SEC Whistleblower Office? . . . . .	2
What employment protections are available for SEC whistleblowers? . . . . .	2
What violations qualify for an award? . . . . .	2
What are the largest SEC whistleblower awards? . . . . .	3
<b>WHISTLEBLOWERS ELIGIBLE FOR AN AWARD . . . . .</b>	<b>7</b>
Who is an eligible SEC whistleblower? . . . . .	7
Can I submit a tip if I was involved in the fraud or misconduct? . . . . .	8
Can I submit a tip if I agreed to a confidentiality provision in an employment/severance agreement? . . . . .	8
Can compliance personnel, auditors, officers, or directors qualify for an SEC whistleblower award? . . . . .	9
<b>REPORTING TO THE SEC AND MAXIMIZING AWARD PERCENTAGE . . . . .</b>	<b>11</b>
When is the best time to report the fraud or misconduct to the SEC? . . . . .	11
Do I have to report the violation to my company before reporting it to the SEC? . . . . .	12
Can I submit an SEC whistleblower claim if the SEC already has an open investigation into the matter? . . . . .	12
How do I submit a tip to the SEC? . . . . .	13
Are there any tips for submitting a TCR to the SEC? . . . . .	16
What type of evidence should I provide to the SEC? . . . . .	19
What factors does the SEC consider when determining the amount of an award? . . . . .	20
Why should I choose the Zuckerman Law to represent me in my SEC whistleblower claim? . . . . .	22
<b>AFTER REPORTING TO THE SEC . . . . .</b>	<b>23</b>
What happens after I submit a tip to the SEC? . . . . .	23
How long does it take to receive an SEC whistleblower award? . . . . .	23



## OVERVIEW OF THE SEC WHISTLEBLOWER PROGRAM

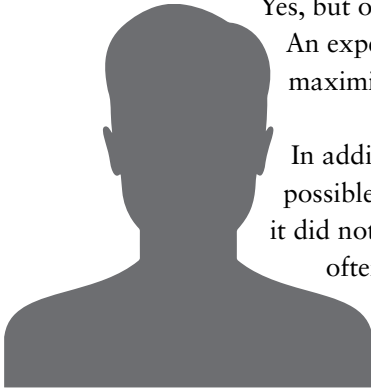
### What is the SEC Whistleblower Program?

**T**he Dodd-Frank Act (“Dodd-Frank”) was signed into federal law on July 21, 2010, in response to the financial crisis of 2008. That recession, widely considered “the worst financial crisis since the Great Depression,” struck after the U.S. housing market crashed and the entire financial industry nearly collapsed. The stock market lost about US\$25 trillion in value, and 23 million people lost their jobs. The global economy fell into a recession.

Dodd-Frank, passed in the wake of the global recession, is the most significant overhaul of U.S. financial regulations since the Great Depression. Among the Act’s achievements are the creation of the U.S. Securities and Exchange Commission (“SEC”) [Whistleblower Office](#) and the [SEC Whistleblower Program](#). This program offers awards to [eligible whistleblowers](#) who provide [original information](#) that [leads to successful SEC enforcement actions](#) with total civil penalties exceeding \$1 million. A whistleblower may receive an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC and in related actions brought by other regulatory or law-enforcement authorities.

The SEC Whistleblower Office, in its short history, has successfully exposed violations of federal securities law and appropriately rewarded whistleblowers who provided information about those violations. Since 2011, the SEC Whistleblower Office has received over 18,000 tips, some of which led to enforcement actions resulting in a total of over \$584 million in sanctions (including more than \$346 million in disgorgement and interest). Furthermore, the whistleblower office has issued well over \$100 million in awards to whistleblowers for information and assistance. In 2016 alone, the SEC awarded more than \$57 million to whistleblowers. Notably, many of the [largest SEC whistleblower awards](#) have been issued in the past year.

### Can I submit an anonymous tip to the SEC Whistleblower Office?



Yes, but only if you have an attorney represent you in connection with your submission. An experienced whistleblower attorney can skillfully guide you through the process, maximizing the likelihood that your identity is not revealed to unauthorized parties.

In addition, the SEC is committed to protecting whistleblowers' identities, to the extent possible. It would be very difficult for the SEC to receive the best fraud-exposing tips if it did not take steps to protect whistleblowers' confidentiality. For example, the SEC will often issue awards and provide no information about the whistleblower or even the enforcement action. According to the [SEC Whistleblower Office's 2016 Annual Report to Congress](#), almost 25% of whistleblowers who received awards reported anonymously.

There are limits, however, to the SEC's ability to shield your identity, and in certain circumstances the SEC must disclose it to outside entities. You should consult with an experienced whistleblower attorney for more details on your specific claim.

### What employment protections are available for SEC whistleblowers?

Under Dodd-Frank, which created the SEC Whistleblower Program, employers cannot discharge, demote, suspend, harass, or in any way discriminate against employees for raising concerns about a potential securities-law violation. Remedies may include reinstatement, double back pay, litigation costs, expert-witness fees, and attorneys' fees.

Employees may also have a [retaliation claim under the Sarbanes-Oxley Act \("SOX"\)](#). The remedies are similar to those under Dodd-Frank, but SOX also includes special damages, such as emotional distress, impairment of reputation, and other noneconomic harm resulting from retaliation. A jury recently awarded \$11 million to a whistleblower in a SOX retaliation case.

### What violations qualify for an award?

Any violation of the federal securities laws qualifies. The SEC has broad jurisdiction over a wide range of industries and entities—both public and private. The most common tips involve:

- Accounting fraud;
- Investment and securities fraud;
- Insider trading;
- Foreign bribery and other FCPA violations;
- EB-5 investment fraud;
- Manipulation of a security's price or volume;
- Fraudulent securities offerings and Ponzi schemes;
- Unregistered securities offerings;
- Investment adviser fraud;
- False or misleading statements about a company or investment;
- Inadequate internal controls;
- Deceptive non-GAAP financial measures; and
- Violations of auditor independence rules.

Click on the federal securities laws violations above for a detailed description of the violation and related enforcement actions. Finally, note the SEC has jurisdiction over additional areas as well. Whistleblowers should contact an experienced SEC whistleblower lawyer to see if their claim qualifies.



### What are the largest SEC whistleblower awards?

The SEC issued its largest award, \$30 million, on September 22, 2014. The second- and third-largest awards to date are \$22 million, issued in August 2016, and \$20 million, awarded in November 2016.

Under the program, the SEC issues awards to eligible whistleblowers who provide original information

that leads to successful SEC enforcement actions with total civil penalties exceeding \$1 million. A whistleblower may receive an award of between 10% and 30% of the total sanctions imposed.

Since 2012, the SEC has issued more than \$149 million in awards to whistleblowers. In 2016 alone, the program awarded more than \$57 million in to whistleblowers, which is more than the agency awarded in all the previous years of the program combined.

The details of most awards are not publicly available because many whistleblowers file anonymously, through attorneys. In these situations, the SEC goes to great lengths to not reveal any information, including any details about the enforcement action, that could expose the whistleblower.

For example, when the SEC issued \$30 million to an anonymous whistleblower, it did not identify the whistleblower, indicate where the whistleblower was from, or even disclose the case that the award was tied to. Andrew Ceresney, director of the SEC's enforcement division, simply said, "This whistleblower came to us with information about an ongoing fraud that would have been very difficult to detect." Further, the director mentioned that the award could have been even bigger if the whistleblower had timelier reported the information to the SEC.

However, not all whistleblowers file anonymously. On August 30, 2016, the SEC issued an award of more than \$22 million to a former Monsanto executive. (Note that special rules apply to certain individuals, such as executives, auditors, and compliance personnel.) According to the SEC's press release, Monsanto lacked sufficient internal controls to account for millions of dollars in rebates. This control failure allowed the company to book a sizable amount of revenue without recognizing the costs associated with the rebates. This resulted in Monsanto's materially misstating its consolidated earnings during a three-year period, ultimately leading to an \$80 million penalty from the SEC.

## SEC Whistleblower Awards

The table below identifies some of the larger whistleblower awards that the SEC has issued:

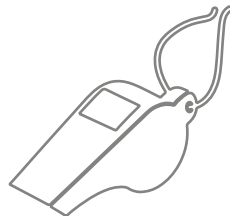
Whistleblower Award	Date	Basis for Whistleblower Award
\$30 million	September 22, 2014	<p>A foreign whistleblower came to the SEC with “information about an ongoing fraud that would have been very difficult to detect.”</p> <p>This reward underscores that <a href="#">non-US citizens</a> are eligible whistleblowers in the SEC Whistleblower Program.</p>
\$22 million	August 30, 2016	<p>A former financial executive at Monsanto exposed <a href="#">weaknesses in the company’s internal controls</a> that failed to account for millions of dollars in rebates. Monsanto agreed to settle the <a href="#">allegations of accounting fraud</a> for \$80 million.</p> <p>Importantly, <a href="#">auditors and accountants</a> are eligible whistleblowers in the SEC Whistleblower Program. They are often best positioned to witness this type of wrongdoing.</p>
\$17 million	June 9, 2016	<p>A company insider “substantially advanced the agency’s investigation and ultimate enforcement action.”</p> <p>This award highlights that whistleblowers may receive a reward if they provide original information regarding an open SEC investigation that <a href="#">significantly contributes</a> to the success of the action.</p>
\$14 million	September 30, 2013	<p>The whistleblower exposed a fraudulent offering that targeted foreign nationals who sought to invest in the U.S. economy and gain a legal pathway to citizenship through the <a href="#">EB-5 Immigrant Investor Program</a>.</p> <p>In 2016, the SEC increased staff in its investment adviser/investment company examination program. As such, we expect to see an <a href="#">increase in the number of actions brought against investment advisers and companies</a> in the coming years.</p>

## SEC WHISTLEBLOWER AWARDS TABLE CONTINUED

Whistleblower Award	Date	Basis for Whistleblower Award
\$7 million	January 23, 2017	<p>Three whistleblowers split an award of more than \$7 million after helping the SEC prosecute an investment scheme.</p> <p>One whistleblower provided information that was a primary impetus for the start of the SEC's investigation. That whistleblower received more than \$4 million. Two other whistleblowers jointly provided new information during the SEC's investigation that significantly contributed to the success of the SEC's enforcement action. Those two whistleblowers will split more than \$3 million.</p>
\$5.5 million	January 6, 2017	<p>An anonymous whistleblower orally provided the SEC with critical information about ongoing securities fraud. Generally, the SEC requires that whistleblower provide information "in writing." However, the SEC waived that requirement in this case due to "highly unusual circumstances" and awarded the whistleblower more than \$5.5 million for the information.</p> <p>This award marks the second time that the SEC has deemed it appropriate to waive a procedural requirement. Former chief of the SEC whistleblower office, Sean McKessy, noted that this award underscores the SEC's discretionary authority to do what justice requires.</p>
\$5 million	May 17, 2016	<p>A former company insider's detailed tip led the agency to uncover securities violations that would have been nearly impossible for it to detect but for the whistleblower's information.</p> <p>In the SEC's press release, it noted that employees are often best positioned to witness wrongdoing.</p>

## SEC WHISTLEBLOWER AWARDS TABLE CONTINUED

Whistleblower Award	Date	Basis for Whistleblower Award
\$4 million	September 30, 2016	<p>The SEC issued the award to an anonymous whistleblower for “alter[ing] the agency to a fraud.”</p> <p>The lack of information about the whistleblower and the enforcement action underscores how serious SEC is about protecting the confidentiality of whistleblowers.</p>
\$3.5 million	May 13, 2016	The whistleblower “bolstered an ongoing investigation with additional evidence of wrongdoing” which helped the SEC during settlement discussions with the company.
\$3.5 million	December 5, 2016	A whistleblower received an award of \$3.5 million for providing original information to the SEC that led to a successful enforcement action.



## WHISTLEBLOWERS ELIGIBLE FOR AN AWARD

### Who is an eligible SEC whistleblower?

**M**ost individuals, regardless of citizenship, may be “eligible” whistleblowers if they voluntarily provide the SEC with original information about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. The information provided must lead to a successful SEC action that results in monetary sanctions exceeding \$1 million. One or more people can act as a whistleblower, but companies or organizations cannot qualify as whistleblowers. Furthermore, individuals are not required to be employees of a company to submit information about that company.

Different eligibility rules apply to:

- officers, directors, trustees, or partners of an entity, if another person informed them of allegations of misconduct, or if they learned the information in connection with the entity’s processes for identifying, reporting, and addressing possible violations of law;
- employees whose principal duties involve compliance or internal-audit responsibilities, or those employed by, or otherwise associated with, a firm retained to perform compliance or internal-audit functions for an entity;
- those employed by, or otherwise associated with, a firm retained to conduct an inquiry or investigation into possible violations of law; and
- employees of, and other persons associated with, a public accounting firm, if they obtained the information through the performance of an engagement required of an independent public accountant under the federal securities laws, and that information related to a violation by the engagement client or the client’s directors, officers, or other employees.

Any of those individuals may be eligible for an SEC whistleblower award if:

- his or her disclosure is necessary to prevent conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;
- the entity is engaging in conduct that will impede an investigation of the misconduct; or
- at least 120 days have elapsed since either:
  - the whistleblower provided the information to the entity's audit committee, chief legal officer, or chief compliance officer (or their equivalents), or to his or her supervisor; or
  - the whistleblower received the information, if he or she received it under circumstances indicating that the entity's audit committee, chief legal officer, or chief compliance officer (or their equivalents), or the whistleblower's supervisor was already aware of the information.



#### Can I submit a tip if I was involved in the fraud or misconduct?

Yes, but you should consult with an experienced securities-enforcement attorney before contacting the SEC to determine your potential liability. Once you submit a tip, the SEC can forward the information to other agencies, including the Department of Justice, for potential criminal investigations.

Importantly, even though the SEC Whistleblower Program allows anonymous submissions through attorneys, the agency will issue an award only after it determines that the whistleblower is eligible for the award. The SEC may reduce the amount of an award if the whistleblower participated in, or was culpable for, the violation.

#### Can I submit a tip if I agreed to a confidentiality provision in an employment/severance agreement?

Yes. The SEC firmly rejects any employer's attempts to impede an employee's communication with the SEC about a possible securities-law violation by using instruments such as:

- overly broad confidentiality provisions in severance or employee agreements;
- waivers of the right to receive a whistleblower reward; or
- agreements to notify the company's legal counsel before disclosing information to government agencies.

### Can compliance personnel, auditors, officers, or directors qualify for an SEC whistleblower award?

Many key compliance personnel, including internal auditors, external auditors, officers, and directors, may incorrectly assume that they are not eligible for awards under the SEC Whistleblower Program. Under certain circumstances, however, the SEC allows these employees to report violations and become eligible for awards. In doing so, the SEC recognizes that key compliance personnel often are in the best position to recognize and expose fraud.

#### When Can Key Compliance Personnel Report to the SEC?

Generally, individuals who are integral to a company's compliance are not eligible for awards, unless an exception applies. These individuals include employees whose principal duties involve compliance or internal-audit responsibilities, employees of public accounting firms, and even the officers, directors, trustees, and partners of the relevant entity.

The exceptions to this rule, found in [Section 21F-4](#) of the Securities Exchange Act, allow these individuals to report to the SEC and receive awards under the program if:

- they reasonably believe the disclosure is necessary to prevent conduct likely to cause “substantial injury” to the financial interest or property of the entity or investors;
- they reasonably believe the entity is engaging in “conduct that will impede an investigation of the misconduct”; or
- at least 120 days have passed either since they properly disclosed the information internally, or since they obtained the information under circumstances indicating that the entity's officers already knew of the information.

The 120-day exception does not apply to external auditors who obtained the information during their audit of an issuer. Instead, those external auditors can report to the SEC immediately after they inform a superior in their accounting firm about improper or illegal client activity and the accounting firm fails to promptly report that information to the SEC. The first two exceptions also apply to external auditors when the violation is “material.”

#### Information Necessary to Prevent “Substantial Injury” to Financial Interest

In April 2015, the SEC issued an [award of more than \\$1 million to a compliance professional](#) who “had a reasonable basis to believe that disclosure to the SEC was necessary to prevent imminent misconduct from causing substantial financial harm to the company or investors.” The SEC has not, however, provided detailed guidance on what type of conduct is “likely” to cause “substantial financial harm.” This vagueness may work in whistleblowers' favor, as the SEC has used its discretion to issue awards liberally.

In a recent enforcement action, the SEC awarded more than \$5.5 million to a whistleblower who failed to meet the requirements for an award. Specifically, the whistleblower did not provide his or her disclosures “in writing,” as the Whistleblower Program requires. The SEC [cited](#) “highly unusual circumstances” in deciding to waive the “in writing” requirement for the whistleblower, who had provided information in a manner “expressly requested” by SEC enforcement staff.

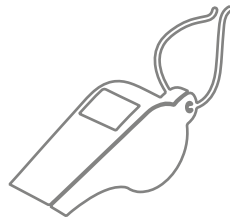
**Information About “Conduct that Will Impede an Investigation of the Misconduct”**

Key compliance personnel can also report to the SEC if their information reveals conduct by the entity that will impede an investigation of the misconduct. While the SEC has not yet issued an award under this exception, the rule appears to be straightforward: if one has evidence of tampering with an internal investigation, then he or she is permitted to report to the SEC immediately. This improper conduct may include destroying documents, influencing witnesses, or otherwise concealing material information.

**120-Day Exception**

The final, and most concrete, exception applies where at least 120 days have passed since the compliance personnel reported the information to their supervisor or to another person in the organization who is responsible for remedying the violation (i.e., audit committee, chief legal officer, chief compliance officer, or their equivalents). Alternatively, the individual may report the information at least 120 days after receiving the information, if it was received under circumstances indicating that any of the above-mentioned parties was already aware of it.

Importantly, any whistleblower who chooses this route should document the date of his or her disclosure in, for example, an email. Prior to receiving an award, all whistleblowers must prove their eligibility. Documentation that proves they waited 120 days may be the difference between a multimillion-dollar award and nothing.



## REPORTING TO THE SEC AND MAXIMIZING AWARD PERCENTAGE

### When is the best time to report the fraud or misconduct to the SEC?

In most cases, whistleblowers should report fraud or misconduct to the SEC as soon as possible. While some situations require a whistleblower to wait 120 days before providing information to the SEC, most prudent whistleblowers will raise concerns immediately. There are a few reasons for this:

1. To be eligible for an award, a whistleblower must provide the SEC with “**original information**”—i.e., information not already known to the SEC. If someone reports another individual’s information to the SEC first, the latter will not be entitled to a percentage of any monetary sanctions collected.
2. Even if a whistleblower is the first to report the information, the SEC considers the timeliness of information to be a **significant factor** when determining the size of an award. Many whistleblowers wait too long to report to the SEC and so receive substantially reduced awards. About 20% of the awards issued through 2015 were reduced because of an unreasonable reporting delay.
3. As a practical matter, the SEC is more likely to act on **timely information**. The SEC receives a significant number of tips and has limited resources. The best claims reveal fraud that the SEC can halt and whose impact the SEC can potentially minimize. The SEC will probably not act on tips about speculative fraud that occurred years ago.

That said, anyone who may have original information about a securities-law violation should hire a law firm that can quickly: (1) assess the claim; (2) draft a compelling tip, complaint, or referral (“TCR”); and (3) file with the SEC. In our experience, Zuckerman Law has been able to file whistleblowers’ TCRs months before other law firms can even assess potential claims.

### Do I have to report the violation to my company before reporting it to the SEC?

To remain eligible for an award, most whistleblowers do not have to report internally before reporting to the SEC. (See [eligibility requirements](#) for details.) However, the SEC provides incentives for internal reporting. For example:

- If a whistleblower reports internally, and then to the SEC within 120 days of the internal disclosure, then the SEC will use the date of the internal report in determining whether the whistleblower provided “original information.” This internal reporting essentially “holds your place in line.”
- If a whistleblower’s internal disclosure prompts a company investigation, the whistleblower will benefit from all the information discovered in that investigation.
- The SEC may increase the size of a whistleblower’s award if the whistleblower participated in the company’s internal compliance systems.



Notably, some whistleblowers must report internally before reporting to the SEC. (See [eligibility requirements](#) for details.)

Federal circuits are split regarding whether whistleblowers who report potential securities-law violations to their employers but not to the SEC are protected from retaliation under the program.

### Can I submit an SEC whistleblower claim if the SEC already has an open investigation into the matter?

Yes. Even if the SEC already has information about a particular securities-law violation, you can still qualify for an award if your information “**significantly contributes**” to the success of a resulting SEC enforcement action. According to the [SEC Whistleblower Office’s 2016 Annual Report to Congress](#), such information accounted for **40% of the awards in 2016**. A whistleblower’s information may “significantly contribute” to an enforcement action in several ways, including if the information:

- allows the SEC to bring the enforcement action in significantly less time or with significantly less resources;
- expands the scope of the current investigation, leading to additional successful claims; or
- allows the SEC to bring claims against additional parties.

On May 13, 2016, the SEC issued an award of more than \$3.5 million to a whistleblower who “bolstered an ongoing investigation with additional evidence of wrongdoing that strengthened the SEC’s case.” Per the [press release](#) accompanying that award, Mr. Ceresney, the SEC Enforcement Director, explained that “[w]histleblowers can receive an award not only when their tip initiates an investigation, but also when they provide new information or documentation that advances an existing

inquiry.” He added, “This particular whistleblower’s tip substantially strengthened our ongoing case and increased our leverage during settlement negotiations with the company.”

### How do I submit a tip to the SEC?

The [SEC Form TCR](#) (“Tip, Complaint, or Referral”) is the form that whistleblowers and their attorneys use to submit tips to the SEC Whistleblower Office. The form has many sections—whistleblowers and their attorneys should pay close attention to several in particular:

#### Section B of the SEC Form TCR

Section B requests information about the whistleblower’s attorney. This section is important because whistleblowers can [submit their tips anonymously](#) if represented by attorneys, allowing them to leave Section A blank. This is a critical advantage of the SEC Whistleblower Program as compared to other whistleblower programs, such as the [IRS Whistleblower Program](#), which do not allow for anonymous reporting.

#### Section D of the SEC Form TCR

##### *Eligibility*

Section D asks whistleblowers to describe their complaints. Many of Section D’s questions, however, are aimed at determining whether a particular whistleblower is [eligible for an SEC award](#) (even though Section E is technically the “eligibility” section). Importantly, **almost all whistleblowers can become eligible** for awards, if they take certain steps. This includes employees and contractors, such as [compliance personnel, auditors, directors, and officers](#), who may incorrectly assume they are ineligible for SEC awards. Even whistleblowers who were [involved in the fraud or misconduct](#) may be eligible for awards.

External auditors, for example, generally are not eligible to receive SEC whistleblower awards. This is particularly true for external auditors who obtained their information during an audit of an issuer. However, an exception allows these external auditors to become eligible if they report the violation or fraud to a superior in their independent public accounting firms and the firms fail to promptly report the information to the SEC. If this happens, the external auditors can report immediately to the SEC and be eligible for awards.

The SEC’s rules include many similar exceptions that allow otherwise-ineligible whistleblowers to become eligible by taking certain steps. Whistleblowers should consult with an [experienced SEC whistleblower attorney](#) to determine whether they are, or may become, eligible for SEC whistleblower awards. This consultation could be the difference between a multimillion-dollar whistleblower award and no award at all.

##### *Maximize Your Award*

Many questions in Section D will also affect a whistleblower’s future award percentage. Under the program, a whistleblower may receive an award of between 10% and 30% of the total sanctions imposed because of his or her tip. To maximize the size of a potential award, whistleblowers should evaluate the [factors that the SEC considers when determining an award percentage](#) and **stress these factors in their submissions**. This analysis must occur prior to submitting information to the SEC.



Section D, part 5b, for example, asks whether the whistleblower “reported this violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.” While this question may be important in determining a whistleblower’s eligibility (in cases involving, e.g., the [120-day exception](#)), it may also impact a whistleblower’s award percentage. According to the [SEC’s Final Rules](#), the whistleblower office may increase the amount of an award if the whistleblower “reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission.” So, whistleblowers should strongly consider reporting internally to their companies before reporting to the SEC. After reporting internally, however, most whistleblowers are [incentivized to report to the SEC as soon as possible](#).

Another way to maximize a potential award lies in Section D, part 12, which asks whistleblowers to provide “any additional information [they] think may be relevant.” This section offers whistleblowers an opportunity to identify and emphasize other aspects of the claim that would support an increased award percentage. The SEC may issue a larger award to a whistleblower who, for example, experienced any “unique hardships . . . as a result of his or her reporting and assisting in the enforcement action.” ([Rule 21F-6\(a\)\(2\)\(vi\)](#).) Whistleblowers should, on their Form TCR, discuss any retaliation they experienced and any personal risks they took to expose the fraud. Again, whistleblowers should consider these factors **before** submitting a tip to the SEC.

#### *Identify the Securities-Law Violations for the SEC*

Section D, part 8 asks whistleblowers to explain why they believe the acts described “constitute a violation of the federal securities laws.” Whistleblowers should determine [what violations qualify for an SEC award](#), and provide the SEC with a clear **roadmap** describing how the reported acts establish specific qualifying violations.

Whistleblowers should also **describe why the violations are material**. In the past five years, whistleblowers have filed more than 18,000 tips with the SEC Whistleblower Office. The SEC will use its limited resources to investigate only the best tips. Whistleblowers should therefore explain, in detail, why their tips warrant the use of the SEC’s resources. If a whistleblower is uncertain about a specific violation, he or she may benefit from reading prior SEC enforcement actions and consulting with an experienced SEC whistleblower attorney.

#### *Provide Specific Evidence of the Violation*

Section D, part 9 asks whistleblowers to “[d]escribe all supporting materials in [their] possession and the availability and location of any additional supporting materials not in [their] possession.” The SEC Whistleblower Office is more likely to act on a tip if it is supported by strong evidence. Evidence is strong if it is specific, timely, and credible. For example, a whistleblower may provide documentation that walks the SEC through an example of the fraud, step by step, and explains how the fraud materially impacts the entity, its investors, or both.



Notably, recent decisions have clarified what company documents a whistleblower may use—even if the whistleblower signed a confidentiality agreement—to disclose fraud to the government. In *Erhart v. Boff Holding, Inc.*, the U.S. District Court for the Southern District of California held that confidentiality agreements do not trump federal whistleblower rights and that whistleblowers are permitted to take an “appropriate” amount of company documents to disclose fraud to the government. According to the order, a whistleblower’s evidence may be considered “appropriate” when it is carefully selected, specifically related to the violation, and accessible in the ordinary course of the employee’s duties. Whistleblowers who engage in “vast and indiscriminate” collection of company documents, on the other hand, may not be immune from potential liability.

Finally, whistleblowers should not provide all types of evidence. The SEC does not want, for example, information that may violate the company’s attorney-client privilege. If a whistleblower has questionable evidence, he or she should consult with an attorney and should potentially notify the SEC to have its taint team handle the evidence.

#### *Protect Your Identity*

After providing a detailed explanation of the fraud and the evidence to support it, a whistleblower should identify any information in the submission that could expose him or her as the whistleblower. Section D, part 11 asks whistleblowers to “[i]dentify with particularity any documents or other information in [their] submission[s] that [they] believe could reasonably be expected to reveal [their] identit[ies] and explain the basis for [their] belief that [their] identit[ies] would be revealed if the documents were disclosed to a third party.”

The SEC takes its responsibility to protect whistleblowers’ identities very seriously. Whistleblowers can assist this effort by flagging any information that could potentially identify them. The SEC will then determine the best path to open an investigation without tipping off the target that a whistleblower is even involved.



## Section F of the SEC Form TCR

Whistleblowers must sign the Form TCR under the penalty of perjury. Section F requires the whistleblower to affirm the following:

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

If a whistleblower submits a tip anonymously, then his or her signed declaration will not be included in the SEC filing. Rather, the anonymous whistleblower's attorney will sign Section G and keep the whistleblower's signed declaration in a private file.

### Are there any tips for submitting a TCR to the SEC?

The SEC Whistleblower Program has awarded more than \$150 million to 42 whistleblowers. The orders announcing the awards, while sparse, offer critical guidance on how to: (1) recover an award; and (2) maximize the award percentage. These five lessons are drawn from those orders and our experience representing SEC whistleblowers.

#### Tip #1: Establish a Material Violation

Many SEC whistleblower attorneys will incorrectly begin the analysis of a claim by determining a whistleblower's eligibility for an award. This puts the cart before the horse. The first step in any successful whistleblower claim is to determine whether you can establish a material violation of federal securities law. In other words, can you show the SEC that your tip concerns a violation that is serious enough to warrant the use of its limited resources?

Whistleblowers have filed more than 18,000 tips with the SEC in the past five years. In a perfect world, the SEC would be able to investigate all legitimate tips and stop even immaterial violations. However, the SEC has limited resources, so it can pursue only the best tips. (See Tip #5 on how to get the SEC's attention with your tip.)

If you have a hunch about a violation but lack any proof, then it may be worth investigating further, rather than submitting an incomplete or speculative claim to the SEC. Tips generally fall to the wayside unless they provide "specific" and "credible" information about material violations. That said, most whistleblowers should submit their tips as soon as possible. (See Tip #3.)

#### Tip #2: Quickly Determine Eligibility Because It May Affect Award Percentage

The next step in any successful whistleblower claim is to determine eligibility. This step follows a finding of a material violation because, while most individuals cannot establish a material violation, almost everyone can become eligible for an award, if certain steps are taken. Lawyers, external auditors, and even individuals involved in the wrongdoing are among those who may be eligible for awards.

Analyzing an individual's eligibility is complex. The analysis differs depending on the individual's relation to the company and how the individual obtained the information. For example, auditors may report to the SEC and be eligible for an award if:

- they have a reasonable basis to believe the disclosure is necessary to prevent conduct that is likely to cause “substantial injury” to the financial interest or property of the entity or investors;
- they have a reasonable basis to believe the entity is engaging in “conduct that will impede an investigation of the misconduct”; or
- at least 120 days have passed either since they properly disclosed the information internally, or since they obtained the information under circumstances indicating that the entity's officers already knew of the information.

Auditors *who obtained the information during their audit of an issuer*, however, will be eligible for an award only if:

- they have a reasonable basis to believe the disclosure is necessary to prevent “a material violation of the securities laws” that is likely to cause “substantial injury” to the financial interest or property of the entity or investors;
- they have a reasonable basis to believe the entity is engaging in “conduct that will impede an investigation of the misconduct even if the submission does not contain an allegation of audit firm wrongdoing”; or
- they report the securities-law violation to a superior in their independent public-accounting firm, and the firm fails to promptly report that information to the SEC.

Eligibility depends on various factors. If whistleblowers are uncertain about their eligibility, then they should consult with an experienced SEC whistleblower attorney. A skillful analysis may be the difference between a multimillion-dollar whistleblower award and no award at all. The analysis, moreover, may largely determine the size of an award.

### **Tip #3: Act Fast**

It is never too early to think about maximizing your potential award. Whistleblowers may receive anywhere from 10% to 30% of the monetary sanctions collected in actions brought by the SEC and in related actions brought by other regulatory or law-enforcement authorities. And the timing of a whistleblower's tip is a significant factor that the SEC considers in determining whether, and how much, to award.

To be eligible for an award, a whistleblower must first submit “original information.” Original information is any information that the SEC does not already have. Whistleblowers who wait to report



information, therefore, risk that someone else will submit the same information to the SEC first. Keep in mind that, even if the SEC has already opened an investigation, whistleblowers may still qualify for an award if their information “significantly contributes” to the success of an enforcement action.

Next, the whistleblower office may reduce the amount of an award if the whistleblower unreasonably delays reporting the violation to the SEC. About 20% of the awards issued through 2015 were reduced because of an unreasonable reporting delay. In making this determination, the whistleblower office considers:

- whether the whistleblower failed to take reasonable steps to report the violation or prevent it from occurring or continuing;
- whether the whistleblower was aware of the violation but reported to the SEC only after learning of an investigation into the misconduct; and
- whether there was a legitimate reason for the whistleblower to delay reporting the violation.

For example, on February 28, 2017, the SEC issued an [order](#) reducing an award to 20% of the monetary sanctions collected “because of both the Claimant’s culpability in connection with the securities law violations at issue in the Covered Action and the Claimant’s unreasonable delay in reporting the wrongdoing to the Commission.”

Finally, to be eligible for an award, some whistleblowers must take certain actions (e.g., the 120-day exception for auditors under certain circumstances, see Tip #2) before reporting to the SEC. Whistleblowers should therefore understand and consider the specific eligibility requirements in determining when to report to the SEC.

**Tip #4: Know the Rules Before Filing with the SEC**

Besides avoiding “unreasonable delay,” whistleblowers should be aware of other actions that influence the size of awards. Whistleblowers must learn the rules early on because, as mentioned, some actions must be taken prior to filing with the SEC. For example, the whistleblower office may [reduce](#) the amount of an award if the whistleblower:

- participated in, or was culpable for, the reported securities-law violation; or
- interfered with the company’s internal compliance and reporting systems.

On the other hand, the whistleblower office may increase the amount of an award based on:

- the tip’s significance to the success of any proceeding brought against wrongdoers;
- the assistance that you and your legal representative provide in the SEC action or related action;
- the SEC’s law-enforcement interest in deterring the specific violation; and
- whether, and the extent to which, you participated in your company’s internal compliance and reporting systems.



Accordingly, whistleblowers have an incentive to report internally to their companies' compliance personnel before going to the SEC. If whistleblowers choose to report internally, then [they should also report the same information to the SEC within 120 days](#). That way, in evaluating a potential award, the SEC will consider the date of the internal report, rather than the date that the whistleblower reported to the SEC. As the SEC puts it, the whistleblower office will “hold your place in line.” This may determine, for example, whether a whistleblower submitted “original information.”

**Tip #5: Draft a Tip that Grabs the SEC's Attention**

The SEC Whistleblower Office is relatively small, and thousands of tips are submitted annually. Whistleblowers and their attorneys should tailor their tips to quickly grab the SEC's attention. While we could write a book on this section alone, here are a few “rules” to keep in mind when drafting submissions:

1. Provide the SEC with a clear roadmap for a successful enforcement action. Do not submit a pile of documents and expect the whistleblower office to figure it out. Instead, walk the SEC, step by step, through specific and credible examples of the violation(s).
2. Demonstrate how the violation is “material.” As mentioned, the SEC investigates only those violations that are serious enough to warrant the use of its limited resources. While demonstrating materiality, be sure to analyze the legal issues and tie them to the specific violations. This should include a discussion of potential challenges that the SEC may encounter and how the agency should address them.
3. If possible, provide the whistleblower office with documentation of the violation. The SEC is much more likely to act on a tip that is supported by strong evidence. The SEC does not, however, want all types of evidence. For example, the SEC does not want information that may violate the company's attorney-client privilege (e.g., documents, including emails, that involve advice from inside or outside counsel).

**What type of evidence should I provide to the SEC?**

The SEC says that the best way to make your tip useful is to provide specific, timely, and credible information. The greater the lead, the better. This may include even information whose disclosure violates your company's policies against disclosing confidential or proprietary information.

A recent decision in [Erhart v. Bofi Holdings](#) clarifies that whistleblowers (even whistleblower who signed confidentiality agreements with their employers) are permitted to take “appropriate” company documents that are “reasonable necessary” to disclose fraud to the government. The judge warned, however, that wholesale stripping of confidential documents that is “vast and indiscriminate” may not immunize the whistleblower from potential liability.

Furthermore, the whistleblower should exclude certain types of evidence. For example, the SEC does not want information that may violate the company's attorney-client privilege (e.g., documents, including emails, that involve advice from inside or outside counsel). If you have completed your due diligence

and consulted with an attorney, and you still have questionable evidence, then you may want to notify the SEC so that its taint team can handle that evidence.

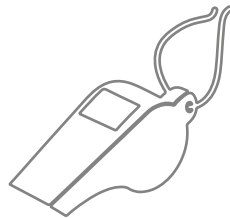
### What factors does the SEC consider when determining the amount of an award?

Many factors affect the amount of an award. The SEC may **increase** the amount of an award based on the following factors:

1. The **significance of the tip** to the success of any proceeding brought against wrongdoers. A tip's significance depends on, for example:
  - the nature of the reported information, including whether the information's reliability and completeness allowed the SEC to conserve resources; and
  - the degree to which the information supported one or more successful claims brought by the SEC or related actions brought by other regulatory or law-enforcement authorities.
2. The **extent of the assistance** that you and your legal representative provided in the SEC action or related action. Considerations include:
  - whether you provided ongoing, extensive, and timely cooperation and assistance;
  - the timeliness of your initial report to the SEC or to your employer;
  - the resources conserved because of your assistance;
  - whether you appropriately encouraged or authorized others, who might otherwise not have participated in the investigation or related action, to assist SEC staff;
  - your efforts to remediate the harm caused by the violations; and
  - any unique hardships you experienced as a result of blowing the whistle.
3. The SEC's law-enforcement **interest in deterring the specific violation**. Consider factors such as:
  - how much an award enhances the SEC's ability to enforce the federal securities laws and protect investors;
  - the degree to which an award encourages the submission of high-quality information;
  - whether the specific violation is an SEC priority; and
  - the dangers of the specific violation to investors.
4. Whether, and the extent to which, you **participated in your company's internal compliance and reporting systems**. Think about:
  - whether you reported internally before, or at the same time as, you reported to the SEC; and
  - whether you assisted any internal investigation concerning the violation.

Conversely, the SEC may **reduce** the amount of an award based on these considerations:

1. If you participated in, or were culpable for, the securities-law violation(s) you reported. Consider the following:
  - your role in the violation;
  - your education, training, experience, and position of responsibility at the time the violation occurred;
  - whether you acted knowingly and intentionally;
  - whether you financially benefitted from the violation;
  - whether you committed a violation in the past;
  - the egregiousness of the underlying violation; and
  - whether you knowingly interfered with the SEC's investigation of the violation.
2. If you unreasonably delayed reporting the violation(s) to the SEC. This determination is based on:
  - whether you failed to take reasonable steps to report or prevent the violation from occurring or continuing;
  - whether you were aware of the violation but reported to the SEC only after learning of an investigation into the misconduct; and
  - whether there was a legitimate reason for you to delay reporting the violation.
3. If you interfered with your company's internal compliance and reporting systems. Consider whether you knowingly:
  - interfered with your company's reporting systems to prevent or delay detection of the violation; or
  - made materially false statements, or provided false documents, to hinder your company's ability to detect, investigate, or remediate the violation.



## AFTER REPORTING TO THE SEC

### What happens after I submit a tip to the SEC?

**T**he Office of Market Intelligence (“OMI”) evaluates incoming tips, complaints, or referrals (known as “TCRs”). At least two SEC attorneys evaluate each TCR submitted. Specific, credible, and timely TCRs are assigned to members of the SEC staff for further investigation or analysis. If the OMI determines that a TCR warrants deeper investigation, the staff will assign it to one of the SEC’s eleven regional offices, to a specialty unit, or to an Enforcement group in the Home Office.

If the SEC determines that it needs additional information to evaluate your TCR or to assist it in a resulting investigation, the SEC will contact you or your attorney. You should not expect, however, to receive updates from the SEC regarding your submission.

As a matter of policy, the SEC conducts its investigations on a confidential basis. The purpose of this is to:

- protect the integrity of any investigation from premature disclosure; and
- protect the privacy of the persons involved in an investigation.

Accordingly, there may be very limited information that the SEC can share with you or your attorney regarding what action, if any, the SEC has taken in response to your TCR.

### How long does it take to receive an SEC whistleblower award?

It is very difficult to estimate when the SEC will act on a whistleblower’s information. Over 18,000 tips have been filed with the Whistleblower Office since 2011. Considering the volume of tips and the limited nature of the SEC’s resources, your tip must grab the whistleblower office’s attention to ensure that it is acted upon timely (if at all).

As a practical matter, you are more likely to get your information reviewed and acted upon if you have a lawyer advocating for you. Whistleblower lawyers, especially with experience in SEC whistleblower claims, can help you frame the information in a way that will be more likely to get the SEC's attention. You can help this process by providing your lawyer with specific and credible information that will act as a clear roadmap of the securities-law violation(s).

Prior to submitting a claim, whistleblowers should consult with an experienced attorney to determine how best to present their TCR to the SEC.

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