

# One Minute Memo®



## The SEC's Whistleblower Report Shows Program Picking Up Steam

By Christopher Robertson, Matthew Gagnon and Megan Poonolly

Fresh off its \$14 million bounty award, the Securities and Exchange Commission's ("SEC") Office of the Whistleblower has released its [Annual Report](#) indicating that the Whistleblower Program continues to gain steam. Created by the Dodd-Frank Act, the SEC's Whistleblower Program provides monetary awards to individuals who contribute original information that leads to an SEC enforcement action netting at least \$1 million in disgorgement or penalties. Below are the top five trends revealed by the Annual Report and how they will affect companies:

- **Over \$14 million was awarded to whistleblowers in 2013:** During the 2013 Fiscal Year, the SEC awarded \$14,831,965.64 in reward money to four whistleblowers. Approximately \$14 million of that pot went to a single anonymous tipster in the SEC's *largest bounty to date*. This unprecedented, multi-million dollar payout is likely to attract more tipsters looking to cash out.
- **The Number of Tips Increased 8%.** 2013 is the first year that the SEC has had full year-over-year data to track the progress of the program. That data shows that the program is expanding. During 2013, the SEC received 3,238 tips, an 8% increase over 2012. The SEC emphasized its advertising and promotion efforts in 2013 to raise the visibility of the program, including webinars, presentations and other public engagements. Coupled with this year's significant whistleblower payout, the SEC's marketing efforts can be expected to yield even more tips in the coming years.
- **Not Just a Financial Industry Problem; All Companies are at Risk:** The most common source of tips were activities that potentially affect all public companies, not just hedge funds or other financial industry insiders. Of the 3,238 tips received by the SEC in 2013, 17.2% related to corporate disclosures and financial statements, 17.1% concerned offering fraud, and 16.2% involved market manipulation. These three categories of complaints were also the most common categories of tips received by the SEC in 2012. Those tips came from individuals in all fifty states. California had the highest number by a wide margin, with New York, Florida, Texas, and Illinois rounding out the top five. Companies with overseas operations may be at special risk given that 11.7% of tips came from whistleblowers operating overseas. In light of the high percentage of tips affecting public company disclosures, now is the time to review and update internal compliance and reporting mechanisms.
- **The SEC is Focused on Employer Retaliation and Confidentiality Agreements:** The Annual Report stressed that the Office of the Whistleblower is coordinating with the SEC's Enforcement Division to identify cases where whistleblowers are being retaliated against by their employers and instances in which confidentiality agreements or severance agreements are used to prevent employees from blowing the whistle. The SEC also noted that it is closely monitoring litigation on this issue. This increased attention to retaliation and/or coercion claims means that companies should ensure that they have a robust anti-retaliation policy in place. Employers should also take care to ensure that, if

an employee does blow the whistle, he or she is handled appropriately.<sup>1</sup> Similarly, companies should tread carefully, but deliberately, when confronted with a whistleblower who has or may be absconding with sensitive company information in the course of providing tips, in violation of a confidentiality agreement.<sup>2</sup> Internal complaints remain as dangerous as complaints to the SEC. Although the Fifth Circuit has held that the anti-retaliation provisions of the Dodd-Frank Act provide a private cause of action only for those employees who bring their tips directly to the SEC, the SEC's position in the Whistleblower Annual Report is that the Fifth Circuit's decision is "contrary to several district court decisions and may contradict a Commission regulation" that provides that employees are protected by Dodd-Frank even if they report internally.

- **Anonymity Remains a Priority:** In the Annual Report, the SEC highlighted the various measures it takes to preserve the confidentiality of whistleblower identities. The appeal of anonymity is another factor likely to spur additional would-be whistleblowers to come forward.

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<sup>1</sup> For more information on common situations employers face with whistleblowers, see Seyfarth's Workplace Whistleblower series, available at <http://www.seyfarth.com/Workplace-Whistleblower>.

<sup>2</sup> For more information on the interplay between confidentiality agreements, trade secrets, and whistleblowers, see [http://www.seyfarth.com/dir\\_docs/publications/WorkplaceWhistleblowerMilligan070213.pdf](http://www.seyfarth.com/dir_docs/publications/WorkplaceWhistleblowerMilligan070213.pdf).

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