

SEC Announces Record-Breaking Year for Whistleblower Program

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**Debevoise
& Plimpton**

On Nov. 15, 2018, the U.S. Securities and Exchange Commission’s (the “SEC” or the “Commission”) Office of the Whistleblower (the “OWB”) provided its annual report to Congress describing the status of the whistleblower program and touting a “record-breaking year” for the program.¹ The Report highlights that the OWB received more than 5,200 whistleblower tips last year, a 20 percent increase over last year, and awarded more than \$168 million to 13 individuals, which was more than the OWB had awarded in all its prior years combined.² Aside from the record numbers of rewards and tips, in the past year, the Commission has also proposed important amendments to the whistleblower rules in response to the U.S. Supreme Court’s decision in *Digital Realty v. Somers*,³ which clarified that the anti-retaliation protections under the Dodd-Frank Act are limited to those who have reported to the SEC. The Report leaves little doubt that the whistleblower program continues to have a transformative impact on the enforcement program, has fully hit its stride, and will continue to play a significant role in supporting the SEC’s enforcement efforts in years to come.

Record year of tips and rewards. In this last fiscal year, the SEC ordered whistleblower awards totaling approximately \$168 million to 13 individuals. This amount exceeded the aggregate total of \$158 million awarded in all the prior years combined. The OWB issued the largest award in the program’s history this past fiscal year, with the announcement in March of an \$83 million award paid to three individuals.⁴ Since its creation in 2011, the OWB has now awarded \$326 million to 59 individuals.⁵

The number of tips and complaints has been steadily increasing each year, with the OWB reporting that it has received more than 28,000 whistleblower tips since 2011. The OWB received 5,282 tips during 2018, which is approximately 1,000 more than 2017 and a record high for the office.⁶ The Commission receives tips from both domestic and

¹ Securities and Exchange Commission, 2018 Annual Report to Congress Whistleblower Program, 1, 2018 (hereinafter, the “Report”).

² *Id.*

³ *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, slip op. (Feb. 21, 2018).

⁴ *Id.* at 9-10.

⁵ *Id.* at 1.

⁶ *Id.* at 20.

international sources. In 2018, the states with the most tips were California, New York, Florida, Texas, and New Jersey, with more than 101 tips from each of these states.⁷ In 2018, the Commission received tips from 72 countries, with the most whistleblower submissions coming from individuals in the United States, Canada, the United Kingdom, and Australia.⁸

According to the Report, the most common whistleblower complaints concerned Offering Fraud, Corporate Disclosures and Financials, and Manipulation.⁹ Notably, thirty-nine tips involved “Initial Coin Offerings and Cryptocurrencies,” a new category added to the Tips, Complaints, and Referrals Intake system (“TCR”) in the last quarter of FY 2018.

Proposed whistleblower rule amendments. On July 20, 2018, the SEC approved proposed amendments to the Whistleblower Rules, and the public comment period ended on September 18, 2018. The proposed amendments “are intended to increase efficiencies in the whistleblower claims review process, provide the Commission with additional tools in making whistleblower awards to ensure that meritorious whistleblowers are appropriately rewarded for their efforts, and align the requirements for anti-retaliation protection under the Whistleblower Rules with the holding in *Digital Realty*.”¹⁰ The Commission received more than 100 comments but has not published any final rules.

- **Whistleblower Claims Review Process.** The proposed rules seek to bar repeated frivolous claims and streamline the whistleblower review process. Specifically, the Commission would have authority to permanently bar applicants from awards if the applicant has previously submitted three award applications the Commission “finds to be frivolous or lacking a colorable connection between the tip (or tips) and the Commission action.”¹¹ Additionally, the proposed amendments would create a “summary disposition procedure” for certain types of denials, including untimely award applications and applications where the tip was not provided in the form and manner prescribed by the Commission.¹²
- **Additional tools in award determinations.** The proposed rules also seek to broaden the Commission’s discretion in who receives awards and for how much. They would broaden the eligibility of awards to include awards based on deferred prosecution

⁷ *Id.* at 22.

⁸ *Id.* at 23.

⁹ Twenty percent of complaints were Offering Fraud, 19 percent were Corporate Disclosures and Financials, and 12 percent were Manipulation. *Id.* at 21-22.

¹⁰ *Id.* at 26.

¹¹ *Id.*

¹² *Id.*

agreements and non-prosecution agreements entered into by the U.S. Department of Justice or a state attorney general.¹³ In addition, the Commission would have discretion to consider and adjust the size of a whistleblower's award to an amount that is "reasonably necessary" to reward the whistleblower and incentivize other whistleblowers, provided it fits within the statutory range imposed by Dodd-Frank.¹⁴ In particular, the new rule would give the Commission the power to reduce whistleblower awards from large monetary sanctions (at least \$100 million), so long as the award would not fall below \$30 million or 10% of the monetary sanction.

- **Uniform definition of "whistleblower."** On February 21, 2018, in *Digital Realty v. Somers*,¹⁵ the U.S. Supreme Court held that under Section 21F of the Securities Exchange Act of 1934, an employee must report possible securities violations to the SEC to qualify for Dodd-Frank whistleblower protections against employment retaliation. Prior to the *Digital Realty* decision, the SEC whistleblower rules protected employees from retaliation if they reported internally only.¹⁶ The Court also held that there would be no retroactive anti-retaliation protection before the whistleblower reported to the Commission.¹⁷ As a consequence of the Supreme Court's decision, the Report indicates—perhaps unsurprisingly—that the number of tips to the OWB increased. Spurred in part by the *Digital Realty* decision, the SEC has proposed amendments to establish a uniform definition of "whistleblower" that would apply to all aspects of the Dodd-Frank whistleblower provisions (both the anti-retaliation and award provisions) and make clear that whistleblowers need to report to the Commission for the Dodd-Frank protections.

Key takeaways. The Report underscores the growing importance and increasing success of the SEC's Whistleblower Program. The increasing number of tips in the last fiscal year also suggests that more employees are reporting potential wrongdoing directly to the SEC in light of *Digital Realty*. Since there is a strong likelihood that any internal complaint may be concurrently reported to the SEC, we encourage employers to address swiftly any known whistleblower complaints. We recommend that employers, at minimum:

- Review internal policies, practices, agreements, and training programs to ensure (i) that employees are encouraged to report suspected misconduct promptly and

¹³ *Id.* at 27.

¹⁴ *Id.* Whistleblower awards are restricted to a minimum of 10% and maximum of 30% of imposed monetary sanction.

¹⁵ *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, slip op. (Feb. 21, 2018).

¹⁶ The Report at 18-19.

¹⁷ *Digital Realty*, No 16-1276 at 9-12; Debevoise & Plimpton, Client Update, 4, Feb. 22, 2018 (https://www.debevoise.com/~media/files/insights/publications/2018/02/20180222b%20supreme_court_clarifies_whistleblower_protections.pdf).

without fear of retaliation and (ii) that company policies, procedures, and agreements do not interfere with employees' ability to make whistleblower reports to the SEC;

- Train managers on anti-retaliation measures and implement procedures requiring the company's legal or compliance department to be involved in any disciplinary action against an employee who is or might be considered a whistleblower;
- Maintain open communication lines with employees who report potential misconduct; and
- Investigate—potentially with the assistance of counsel—all credible allegations of potential securities law violations and take prompt and appropriate remedial actions.¹⁸

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Please do not hesitate to contact us with any questions.

¹⁸ Debevoise & Plimpton, Client Update, 4-5, Feb. 22, 2018.

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