

# SEC Annual Report on Whistleblowers Shows Tips Received Leveling Off

November 20, 2019

Last week, the U.S. Securities and Exchange Commission's (the "SEC" or the "Commission") Office of the Whistleblower (the "OWB") submitted its annual report to Congress on the status of the SEC's whistleblowing program;<sup>1</sup> for the first year since the program's inception in 2011, the OWB saw a decline in the number of the whistleblower complaints received. While the decrease was marginal, down from 5,282 tips received last year to 5,212 received this year—or just over one percent—it suggests that the number of whistleblower tips received by the SEC may be leveling off after years of growth fueled by increasing awareness of the program and headline-grabbing awards.

SEC Chairman Jay Clayton in a statement accompanying the Report's release acknowledged that "mischaracterizations" about the Commission's 2018 proposed changes to the whistleblower rules, which we [previously summarized](#), may have created uncertainty as to the Commission's commitment to the program and deterred some whistleblowers. In particular, the Chairman cited the rule change that would give the Commission greater discretion to adjust down the largest awards (those above \$30 million), which some critics have characterized as a "cap." Chairman Clayton nonetheless advocated for the new rules, which he expects the Commission to consider the final version of "in the near future," and he said will increase transparency and "continue to incentivize whistleblowers to provide valuable information to aid the Commission in protecting investors and markets."<sup>2</sup>

**Whistleblower Tips and Awards.** Since August 2011, when the Dodd-Frank-mandated whistleblower rules went into effect, the SEC has received over 33,300 whistleblower tips, which have resulted in SEC enforcement actions yielding over \$2 billion in total monetary sanctions, including \$1 billion in disgorgement. Over the same period, the Commission has awarded \$387 million to 67 individual whistleblowers whose information and cooperation led to the SEC's enforcement actions, including awarding \$60 million to eight individuals in FY 2019. Two individuals, who provided information

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<sup>1</sup> SEC, 2019 Annual Report to Congress Whistleblower Program (hereinafter, the "Report"), [https://www.sec.gov/files/OW\\_2019AR\\_FINAL\\_1.pdf](https://www.sec.gov/files/OW_2019AR_FINAL_1.pdf).

<sup>2</sup> Chairman Jay Clayton, SEC, Statement on Whistleblower Program 2018 Annual Report to Congress (Nov. 15, 2019), <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-15-whistleblower>.

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leading to a single enforcement action, were responsible for the bulk of the whistleblower payouts in FY 2019.<sup>3</sup> One, who provided “smoking gun” evidence to the SEC staff, received the third-largest award to date of \$37 million; the other received \$13 million.

The Report describes the breadth in both subject area and geography of tips received over the past year. In FY 2019, the tips received by the SEC made the following types of allegations:<sup>4</sup>

- Corporate disclosures and financials – 1,107 tips (21% of all tips received)
- Offering fraud – 692 tips (13%)
- Manipulation – 535 tips (10%)
- Crypto currency – 89 tips (6%)
- Insider trading – 222 tips (4%)
- Trading and pricing – 201 tips (4%)
- FCPA – 200 tips (4%)

Compared to FY 2018, the SEC in FY 2019 received: 124 more corporate disclosures and financials tips; 362 fewer offering fraud tips; 89 fewer manipulation tips; 40 fewer insider trading tips; 132 fewer trading and pricing tips; and nearly the same number of FCPA tips. In FY 2018, the SEC did not break out crypto currency tips, so that may explain some of the above differences, especially the steep drop in offering fraud tips. The increase in tips on corporate disclosures and financials corresponds with the SEC Division of Enforcement’s continued focus on non-GAAP reporting, revenue recognition, and impairment accounting—all the subject of enforcement actions in the past year.<sup>5</sup>

As with the past several years, tips came from every state in the United States, the District of Columbia, Puerto Rico, and the Virgin Islands, as well as internationally, where nine percent of tips originated—the highest number coming from Canada (77), Germany (44), the United Kingdom (44), and China (32).

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<sup>3</sup> *Order Determining Whistleblower Award Claims*, Exchange Act Release No. 85,412 (Mar. 26, 2019).

<sup>4</sup> The most tips received were under the “other” category, which means the tipster did not select one of the available categories.

<sup>5</sup> See Debevoise & Plimpton, *Accounting & Reporting Enforcement Round-Up* (Oct. 2019), <https://www.debevoise.com/insights/publications/2019/10/accounting-and-financial-reporting-round-up>.

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**Whistleblower Protection.** In addition to the whistleblower incentives offered by the SEC, the Report also references the Commission's actions to protect would-be whistleblowers by enforcing the anti-retaliation and anti-interference provisions of Dodd-Frank. The Report notes that advancing anti-retaliation protections and combating efforts to impede reporting remain a high priority for the OWB.

In the latest example from earlier this month (and not mentioned in the Report, which covers the period October 1, 2018 through September 30, 2019), the Commission brought additional charges against Collectors Café and its CEO Mykalai Kontilai related to their attempted interference with potential whistleblowers.<sup>6</sup> The SEC had previously sued Collectors and Kontilai in connection with an offering fraud and misappropriation. The amended complaint alleges that Collectors and Kontilai, in their attempt to resolve investor disputes, conditioned the return of investor money on investors entering into a settlement agreement with a confidentiality provision that prohibited the investors from communicating with the SEC about the nature of the dispute. Collectors and Kontilai allegedly even sued an investor for damages after the investor had communicated with the SEC in response to a subpoena.

While the SEC has previously brought enforcement actions against employers seeking to prevent current and former employees from reporting to the SEC through confidentiality provisions of various agreements,<sup>7</sup> this case represents the first time enforcement stemmed from a settlement agreement with a former investor. As Jane Norburg, Chief of the OWB, said when announcing the charges, "The SEC's whistleblower protections broadly protect not just employees, but anyone who seeks to report potential securities law violations to the Commission."<sup>8</sup>

**Conclusion.** Although FY 2019 saw a slight decline in tips from FY 2018, the SEC continues to rely on whistleblower tips as an important source for investigations and enforcement actions. Interestingly, the Report suggests that the SEC's whistleblower program has incentivized concurrent reporting to the SEC rather than, as some feared, decreasing the use of internal corporate reporting systems. The Report highlights that seven of the eight FY 2019 award recipients also reported their concerns internally to the company. Indeed, one award recipient provided an anonymous internal tip, which led to an internal investigation, and the company self-reporting to the SEC. In light of this, companies should periodically evaluate their policies and procedures around the

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<sup>6</sup> SEC, Press Release, SEC Charges Issuer and CEO with Violating Whistleblower Protection Laws to Silence Investor Complaints (Nov. 4, 2019), <https://www.sec.gov/news/press-release/2019-227>.

<sup>7</sup> See Debevoise & Plimpton, SEC Brings Two Enforcement Actions against Employers for Taking Steps to Impede Whistleblower Activity (Jan. 20, 2017), <https://www.debevoise.com/insights/publications/2017/01/sec-brings-two-enforcement-actions>.

<sup>8</sup> SEC, Press Release, SEC Charges Issuer and CEO with Violating Whistleblower Protection Laws to Silence Investor Complaints (Nov. 4, 2019), <https://www.sec.gov/news/press-release/2019-227>.

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receipt of whistleblower complaints. At minimum, companies should have procedures for handling the receipt of any internal tip, act promptly to investigate and address the same, and ensure that adequate procedures are in place to protect whistleblowers from potential retaliation.

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Please do not hesitate to contact us with any questions.

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