

## New SEC whistleblower data draws mixed reaction

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In its first full year, a federal whistleblower program that boosted the amount of awards to employees and others who report credible information about fraud and other securities violations spurred more than 3,000 tips and resulted in one five-figure payout.

That data, released by the Securities and Exchange Commission in its most recent [annual report on the Dodd-Frank Whistleblower Program](#), is giving attorneys on both sides of whistleblower litigation a first glimpse at the kind of impact the program — which has been in place for less than 18 months — will have. And while the jury is still out on the long-term implications, lawyers are drawing some early conclusions.

SEC officials and attorneys who represent plaintiffs hail the data as evidence that the program is working.

“Apparently the program is effective,” said Louise A. Herman, a Providence, R.I., employment attorney who is among those who have submitted tips to the SEC on behalf of clients. “I’m hopeful about the program, and I’m glad an award has been made.”

Ian J. McLoughlin, a partner in the Boston office of Shapiro, Haber & Urmy who represents shareholders and others, said the program “is still getting off the ground, so this is uncharted territory.” But the report suggests that the tips, “for the most part, are good ones,” he said.

Defense attorneys, on the other hand, say they are cautiously waiting for more data to evaluate whether the program aids the discovery of actual fraud or simply leads to longer, more costly litigation.

The early data “just confirms the reality that [the program is] here to stay,” said Linda Chatman Thomsen, a partner in the Washington office of Davis Polk and former director of the SEC’s Division of Enforcement.

### Awards boosted, ‘substantial number’ of tips

The program provides that individuals who voluntarily provide the SEC with original information that leads to a successful enforcement action by the agency or a federal court, resulting in a monetary sanction of \$1 million or more, receive mandatory bounties of up to 30 percent of the penalty. Before the new program, whistleblower awards were discretionary and capped at 10 percent.

The program also substantially broadens retaliation protections for employees who report suspected corporate wrongdoing to federal authorities, even in cases in which no malfeasance is ultimately found.

The final rules implementing the program became effective Aug. 12, 2011. Although the SEC issued its [first annual report](#) on the program after fiscal 2011, it covered data only from the first seven weeks of its existence. The fiscal 2012 report, therefore, gives the first snapshot of the program over a yearlong period.

SEC officials expressed satisfaction with the fiscal 2012 findings, which revealed the receipt of 3,001 tips. Of those, 70 came from Massachusetts and 10 from Rhode Island.

“In just its first year, the whistleblower program already has proven to be a valuable tool in helping us ferret out financial fraud,” SEC Chairman Mary L. Schapiro said in a statement accompanying the report’s release. “When insiders provide us with high-quality road maps of fraudulent wrongdoing, it reduces the length of time we spend investigating and saves the agency substantial resources.”

Nationwide, an average of more than eight tips is received per calendar day, McLoughlin said. "That's a substantial number."

Still, only one bounty award reportedly has been granted. In August, the SEC awarded nearly \$50,000 to an unidentified whistleblower who notified the commission of a multi-million-dollar fraud scheme that led to a court-ordered sanction of more than \$1 million. The whistleblower award amounts to 30 percent of the \$150,000 collected from the company so far, and will increase as more is collected from the company.

Thomsen, who formerly worked at the SEC, said it is too early to draw broad conclusions from the data because most investigations last longer than the program has been in place. But an increase in whistleblower tips could cause those investigations to last even longer.

"I don't think there are cases that have been brought [by the SEC] that should not have been brought," Thomsen said. "But are there investigations that last longer than most and that cost more during the investigative stage? I think that is where we are going to see some impact."

#### **'Tension' between laws**

From the program's inception, [defense attorneys have expressed concern](#) that it would turn company employees and stockholders into adversaries, incentivizing them to run to the government with accusations of financial wrongdoing instead of reporting problems internally to allow company officials to address them before SEC auditors get involved.

For practitioners, Thomsen said, there is still a "tension between the philosophy of Sarbanes-Oxley, which is to encourage people to come forward within the company, and Dodd-Frank, which encourages people to go to the government."

But McLoughlin said the rules governing the Dodd-Frank whistleblower program set tight parameters governing who is eligible to receive an award, what type of information will be accepted, and the process and timing under which tips are submitted. Those rules, he said, weed out people who are simply seeking financial gain.

"They are looking for very specific, high-quality, credible, nonpublic information," McLoughlin said.

Herman said concern about bounty seekers belies the reality that most whistleblowers do report improprieties internally. Most often, she said, they seek help from the government when those efforts prove futile.

"Generally, fraud schemes take place at a very high level and typically involve high-level company personnel," Herman said. "It's not unusual for them to turn a blind eye to a single low-level employee."

The fact that whistleblowers went to the government long before the mandatory awards were in place speaks to the fact that bounties are not the driving force behind whistleblowers' actions, Herman said.

"Whistleblowers just want the conduct to stop," she said. "They are risking their careers. They generally turn to the government when they feel like their efforts to resolve the matter internally have failed."

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