# Anonymous Whistleblowers Make Millions for Reporting Their Own Companies to Federal Regulators

***By Ferdose al-Taie, Dykema Cox Smith***

Since 2010, when the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was signed into law, whistleblowers gained significant financial incentives and protections to report wrongdoing by their companies, officers and directors to federal regulators. Generally, a whistleblower is any person who reveals misconduct by his respective employer or another business or entity. Congress drafted the Dodd-Frank whistleblower framework to mirror the most successful tip-based cooperation programs in the federal government: cooperating informants in criminal cases prosecuted by U.S. Department of Justice (DOJ), qui tam provisions of the False Claims Act managed by DOJ, and the Internal Revenue Service's whistleblower reward program. Taking the best structures and protections of each, the Dodd-Frank whistleblower provisions have been wildly successful for the federal government, which requires strict cooperation by its whistleblowers in exchange for anonymity, immunity and potentially significant financial awards. Under the program, **eligible whistleblowers** are entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the U.S. Securities and Exchange Commission, the U.S. Commodity and Futures Trading Commission, and related actions brought by certain other regulatory and law enforcement authorities.

**Dodd-Frank Whistleblower Awards**

| Federal Agency | First Award Year | Aggregate Awards to Date | Number of Individuals Awarded | Largest Individual Award | Minimum Sanctions Requirement | Sanctions Percentage for Award |
|---|---|---|---|---|---|---|
| U.S. Securities and Exchange Commission | 2012 | $266.31 million | 55 | $33 million | $1 million | 10-30% |
| U.S. Commodity Futures Trading Commission | 2014 | $10.34 million | 3 | $10 million | $1 million | 10-30% |

## Who is a Dodd-Frank whistleblower?

Dodd-Frank defines a whistleblower as an individual, or two or more individuals acting jointly. Only natural persons, and not corporations, can be whistleblowers. Whistleblowers have no citizenship or residency requirements, so tips come into the Commission from individuals around the globe.

## Who is an eligible whistleblower?

An eligible whistleblower is a person who **voluntarily provides** the Commission with original information about a possible violation of federal securities law, including: manipulation of a security's price or volume; false or misleading statements about a company, including false or misleading SEC reports, financial statements, investor calls, press interviews; insider trading; abusive naked short selling; Foreign Corrupt Practices Act violations (bribery of, improper payments to, or providing things of value to foreign officials); fraudulent conduct in municipal securities offerings or public pension plans; Ponzi schemes, pyramid schemes, high-yield investment programs; theft or misappropriation of funds or securities; any other conduct that leads to an enforcement action.

## Can company lawyers, compliance professionals, auditors and officers be eligible whistleblowers?

Yes, when at least one of these conditions is present: (1) the whistleblower reasonably believes that disclosure to the Commission is needed to prevent substantial injury to the company or investors; (2) the whistleblower reasonably believes that the company is acting in a way that would impede an investigation of these violations; and, (3) at least 120 days have passed since: (a) the whistleblower reported his information internally to the audit committee, chief legal officer or other appropriate official of the company, or (b) he obtained the information under circumstances indicating that those officials were already aware of the information.

## What is "voluntary" information?

The voluntary information requirement is met when a whistleblower (or his counsel) provides his submission before he receives an inquiry, request or demand that relates to the subject matter of the tip provided. Submissions are not deemed voluntary if the whistleblower has a pre-existing legal or contractual duty to provide the information to the Congress, the Commission, the Public Company Accounting Oversight Board (PCAOB), or any self-regulatory organization, such as the Financial Industry Regulatory Authority (FINRA).

## What is "original" information?

Original information is: (1) derived from the whistleblower's **independent knowledge** or **independent analysis**; (2)

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not already known to the Commission by any other source (if the whistleblower originally provided information to another federal agency which then passed it on to the Commission, this requirement is still met); (3) not exclusively derived from allegations made in certain judicial or administrative hearings, government reports, audits or investigations, or derived from the media—unless the whistleblower herself is a source of that same information.

**Independent knowledge** is defined as factual information that is not derived from publicly available sources. The whistleblower may have observed the facts herself or gained the knowledge from his experiences or communications. This means that a whistleblower can have independent knowledge despite having learned it second or third hand, as long as the person conveying the information was not a company lawyer, compliance officer or auditor.

**Independent analysis** is defined as a whistleblower's examination and evaluation he conducted alone or with others of information that might be publicly-available, where his analysis reveals information not generally known or available to the public.

## How might whistleblower tips "lead to" a successful action?

A whistleblower's information satisfies this requirement if it causes the Commission to open a new investigation, re-open a previously closed investigation, pursue a new line of inquiry in an existing investigation, and only if the Commission brings a successful enforcement action based at least in part on the information the whistleblower provided.

## How much can whistleblowers get awarded for successful tips and where does the money come from?

In order to get an award, the whistleblower's information must lead to a successful Commission action resulting in monetary sanctions of over $1 million. The Commission can award a whistleblower between 10% and 30% of the sanctions total, subject to the unique facts and circumstances of the case and the whistleblower himself. These can be wholly individual awards or awards apportioned among several whistleblowers providing the same or similar information.

The Commission may increase award percentages based on: (1) the significance of information provided by the whistleblower to the success of the proceedings; (2) the extent of assistance provided; (3) law enforcement interest in deterring particular securities violations; (4) whether and to what extent a whistleblower participated in a company's internal compliance reporting systems at the same time or prior to reporting to the Commission.

The Commission may decrease award percentages if the whistleblower: (1) was involved or culpable in the wrongdoing he reported; (2) was unreasonably delayed in making his report; or (3) interfered with his company's internal compliance and reporting systems by making false statements to compliance, for example.

Whistleblower awards are not paid from money that would otherwise go to investors. To ensure that whistleblower awards would not diminish the recovery amounts for securities law violations, Congress established the Investor Protection Fund, from which eligible whistleblowers are paid. Both the SEC and the CFTC provide whistleblower reports to Congress that detail financial information for their respective whistleblower programs and investor protection funds on an annual basis.

## Is there anyone who does NOT qualify as a Dodd-Frank whistleblower?

Subject to the exceptions already discussed related to lawyers, auditors and compliance personnel. Dodd-Frank prohibits a whistleblower: (1) who is, or was at the time he acquired the original information submitted to the Commission, a member, officer, or employee of certain regulatory agencies, including SEC, CFTC and DOJ; a self-regulatory organization such as FINRA; PCAOB; or a law enforcement organization; (2) who has been convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award; (3) who gains the information through the performance of a financial audit required by the securities laws; (4) who fails to submit information to the Commission in such form as the Commission may require by rule.

## Can whistleblowers really stay anonymous?

Yes, early concerns that the Commission would or could not keep whistleblowers' identities anonymous have been allayed. Both the U.S. Securities and Exchange Commission and U.S. Commodity Futures Trading Association have demonstrated their abilities to keep whistleblowers' identities anonymous. Of the 58 individuals who have received Dodd-Frank whistleblower awards to date, only three are publicly-known, and those three disclosed their own identities after receiving their whistleblower awards.

Whistleblowers who wish to stay anonymous file their claims through counsel. All materials and information are passed through the whistleblower's counsel unless and until the Commission needs to assess the individual whistleblower's characteristics to determine the award percentage and actually make payment. If a matter were to litigate in an administrative or court proceeding, it is possible that a whistleblower's identity would become known because of the likelihood he would be called to testify. As a practical matter, however, whistleblower-involved investigations regularly result in settlement because of the quality of information provided by the whistleblower himself.

## What can my company do to stop a whistleblower?

The best way to defend your company is to have an effective and robust securities

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compliance team that allows employees to feel valued and respected for internally reporting wrongdoing. To the greatest extent possible, internal whistleblowers must be given ample information that the issue was resolved or information on why there really was not an issue of concern, to prevent them from externally blowing the whistle. A close adherence to a swift but thorough investigation, remediation and conclusion during the 120-day window is key to protecting the company. Employing outside counsel who build a reporting and resolution system that closely tracks regulatory guidance is important because advice of counsel has been an effective defense for companies charged with securities laws violations by the Commission.

It is very important to remember that employers may not terminate, demote, suspend, harass, or in any way discriminate against a would-be or actual whistleblower. Dodd-Frank expanded the protections for whistleblowers directly and by augmenting the preexisting protections under the Sarbanes-Oxley Act (administered by the Department of Labor). Commission Rule 21F-17(a) makes it plain: "No person may take action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement…with respect to such communications."

The Commission has spent the last few years bringing stand-alone cases just to sanction employers for: retaliatory conduct; taking actions to impede reporting; taking actions requiring employees to notify employers prior to, or contemporaneously with federal agency reporting; requiring employees to sign separation agreements or employment contracts that remove whistleblower incentives; terminate, harassing or demoting employees will be sanctioned. Indeed, it was a featured priority in 2017, with its successes often touted in the Commission's annual whistleblower report to Congress. At the Commission's election, anti-retaliation cases have original jurisdiction in administrative proceedings or federal court, but the Commission has elected to proceed before its own Administrative Law Judges every time.

With the Supreme Court's opinion in Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (Feb. 21, 2018), the unanimous court resolved a Circuit split when it held that in order to trigger Dodd-Frank's anti-retaliation provisions, a whistleblower must report directly to "the Commission," such that an internal report at the company did not qualify that employee for whistleblower status and confer anti-retaliation protections, even though he was terminated for making his report. Digital Realty thus removed any incentive for whistleblowers to report internally before tipping off a federal agency, something that was not necessarily true in the past. Whistleblower counsel are now advising their clients to report directly to the Commission without any internal reporting, a move that exposed them to discovery by their employers anyway. It is unclear how Digital Realty will affect whistleblowing by company lawyers, auditors and compliance professionals, but most whistleblower counsel are advising those categories of clients to make contemporaneous reports to both the Commission and their companies. If the company resolves the issue within 120 days, there may not be a whistleblower award.

About the author: Ferdose al-Taie's practice at Dykema spans securities law, white collar criminal defense and antitrust law. Ferdose joined Dykema in June 2017 from the SEC in Washington, DC where she was Senior Counsel in the Division of Enforcement for more than 4 1/2 years. Her federal service also includes more than 4 years at DOJ where she was appointed as: an AUSA in the District of Arizona, a Special AUSA in the Eastern District of Virginia, and a Trial Attorney at the Antitrust Division in Washington, DC. Prior to her federal service, Ferdose worked as an antitrust lawyer for 6 years at two Am-Law 10 firms in Washington, DC. She began her legal career as the Senior Law Clerk to Chief Judge Jerry Buchmeyer in the U.S. District Court for the Northern District of Texas in Dallas.

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