

## White Collar Criminal Defense

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# SEC Reports Modest Decline in Whistleblower Tips in 2019

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### What You Need To Know:

- For the first time, the SEC's Office of the Whistleblower has reported a modest decline in whistleblower complaints in 2019.
- It is too early to predict whether this is a trend, correction, or one-off decline.
- Registered entities and issuers need to be mindful that the Dodd-Frank Act forbids individuals and entities from preventing others from communicating with the SEC about possible securities law violations and therefore should ensure that their policies with respect to whistleblowers are up to date.

The U.S. Securities and Exchange Commission's (SEC's) Office of the Whistleblower (OWB) recently provided its annual report to Congress.<sup>1</sup> This marks the first decline in whistleblower tips since the OWB was created in 2011.

It has been speculated that this decline is due to a proposed rule change that would allow the SEC to reduce whistleblower awards over \$30 million under certain circumstances. Currently, whistleblower awards may range between 10% and 30% of the monetary penalties imposed in cases in which companies are fined more than \$1 million, depending on certain enumerated factors.<sup>2</sup> Under the proposed rules, where a whistleblower has provided information resulting in the collection of \$100 million or more, and which would otherwise result in an award of over \$30 million, the SEC would have the discretion to adjust the award downward, but in no case to the lesser of either: (a) \$30 million; or (b) 10% of the monetary penalty.<sup>3</sup> What has been widely referred to as a

"cap" on awards has received some criticism. SEC Chairman Jay Clayton addressed these concerns in his statement accompanying the 2019 Annual Report, making clear the SEC's position that "[t]he proposed provision [is] not a 'cap,' it could not and [is] not intended to operate as a 'cap,'" and further that he does "not support a cap."<sup>4</sup> Indeed, two of the SEC's largest whistleblower awards to date—both of which exceeded \$30 million—were provided after these rules were proposed in July 2018. The Chairman indicated that he expected the SEC "to consider final rules in the near future."

Although there has indeed been a decline, as the table below shows, the OWB received its second largest number of whistleblower tips in 2019. The decline of 1% is modest and it is too early to predict whether this is the beginning of a trend, a one-off issue, or a self-correction after the SEC received a remarkably large number of tips in 2018.<sup>5</sup>

<sup>1</sup> SEC, 2019 Annual Report to Congress on the Dodd-Frank Whistleblower Program (2019).

<sup>2</sup> 17 C.F.R. § 240.21F-6.

<sup>3</sup> Amendments to the Commission's Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018).

<sup>4</sup> Chairman Jay Clayton, SEC, Statement on Whistleblower Program 2019 Annual Report to Congress (Nov. 15, 2019), <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-15-whistleblower>.

<sup>5</sup> The notable uptick in reporting in 2018 may be attributed to the U.S. Supreme Court's decision in *Digital Realty Trust Inc. v. Somers*, 138 S. Ct. 767 (2018), in which the Court held that in order to be protected against retaliation under the Dodd-Frank Act, a whistleblower must report alleged securities violations to the SEC, not just internally.

Year	Tips	Change Over Previous Year	Change since Inception
2019	5,212	-1%	74%
2018	5,282	18%	76%
2017	4,484	6%	49%
2016	4,218	8%	41%
2015	3,923	8%	31%
2014	3,620	12%	21%
2013	3,238	8%	8%
2012[*]	3,001	N/A	N/A

Importantly, the Dodd-Frank Act expressly forbids individuals and entities from preventing others from communicating with the SEC about possible securities law violations.<sup>7</sup> Indeed, earlier this

month the SEC amended a complaint to include retaliation claims.<sup>8</sup> Therefore, regardless of the trend, registered entities and issuers need to be mindful of this rule, and should ensure that their policies with respect to whistleblowers are up to date. This would include, for example, a company policy requiring an employee to report alleged misconduct to the company first, before reporting the misconduct to the SEC, or using separation agreements with broad non-disparagement clauses that could be read to restrict employees from communicating with the SEC. A careful review of any such policies by experienced counsel could help prevent the SEC from filing or amending any pleadings claiming that a company was taking steps to impede whistleblowers from reporting alleged misconduct.

<sup>7</sup> 15 U.S.C. § 78u-6(h)(1); 17 C.F.R. § 240.21F-17.

<sup>8</sup> Amended Complaint, *SEC v. Collector's Coffee, Inc.*, No. 19-cv-04355 (S.D.N.Y. Nov. 4, 2019), ECF No. 134. See also 2019 Annual Report at 20-21 (stating that as of Oct. 1, 2019, the SEC had brought 11 enforcement actions or administrative proceedings involving violations of Rule 21F-17).

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