

SEC Whistle-Blower Awards: No Guarantees

By Antoinette Gartrell

Nov. 22 — Most reports of corporate misconduct to the SEC’s Office of the Whistleblower do not result in awards to claimants.

The bounty program—established under Section 922 of the Dodd-Frank Act—grants financial awards between 10 percent and 30 percent to qualified individuals who present original information to the SEC resulting in penalties and other sanctions totaling \$1 million or more. The program has been popular—the SEC has received an increasing number of tips receive every year since the program was launched.

So far, only 37 claimants have actually been granted an award. Claims by 120 claimants were rejected by the agency, according to a review of the office’s final orders. There are four main reasons why.

Successful Enforcement Action

The No. 1 reason an award was denied is that the claimant’s information didn’t lead to a successful enforcement action. Since the program was launched, approximately 99 claimants have been denied an award for this reason.

Information “leads to” a successful enforcement action if it either caused the staff to open or reopen an investigation or inquire into different conduct as part of a current investigation and the SEC brings a

successful action based on conduct that was identified by the whistle-blower. If the conduct was already under investigation, the information must have significantly contributed to the success of the action.

In 2014, three claims were rejected on that basis. That figure ballooned to 74 claimants in 2015, however some cases gave rise to applications from multiple claimants. In 2016, there have been approximately 18 claimants whose bids for awards were denied for not leading to a successful lawsuit.

One possible explanation could be that the SEC’s whistle-blower program is a “one-way street,” according to Dallas Hammer, of counsel at Zuckerman Law, Vienna, Va., and chairman of the firm’s Whistleblower Rewards Practice Group. The SEC doesn’t notify a whistle-blower whose tip has led to a successful enforcement action, he said. Instead, it publishes Notices of Covered Actions and is incumbent on whistle-blowers to spot actions that may be based on their disclosures, Hammer said. Whistle-blowers could be assuming that an enforcement action was based on their tip when that wasn’t the case, he said.

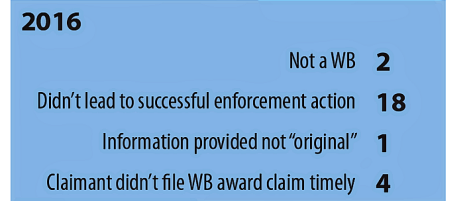
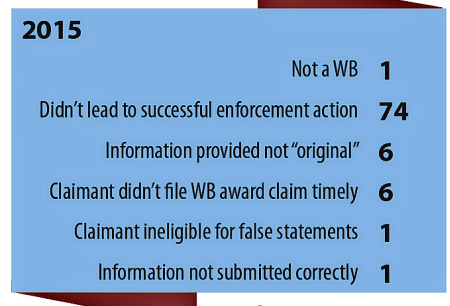
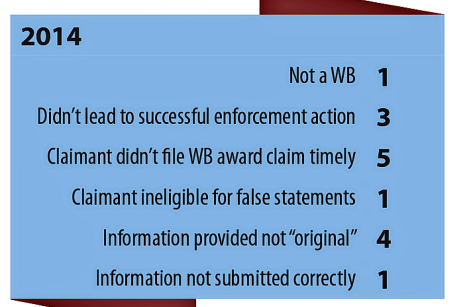
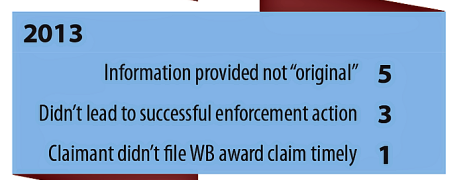
New York lawyer Jordan A. Thomas who represents whistle-blowers on behalf of Labaton Sucharow LLP agreed. He told Bloomberg BNA that the dynamic is particularly prevalent if the monetary sanctions are large and/or the entity involved has a high profile.

Washington lawyer and former SEC enforcement attorney Christian R. Bartholomew of Jenner & Block LLP had another theory. He told Bloomberg BNA that the high number of tips that didn’t lead to an enforcement action is partly due to “serial submitters”—claimants who repeatedly apply for awards based on information that has nothing do with the case.

Other top reasons for denying an award include: claimants waited too long to file for an award; the information provided wasn’t

SEC Whistle-Blower Final Order Denial Reason Breakdown By Year

Figures represent number of individual claimants

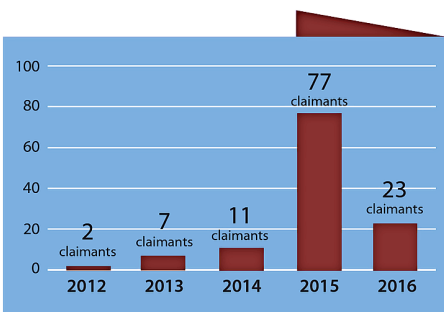


*some denial reasons were issued to multiple claimants in connection with the same matter

Note: Data was compiled from the SEC’s Office of the Whistleblower’s Final Orders and is current as of Nov. 8, 2016. The data reflects each individual claimant listed in each final order.

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SEC Whistle-Blower Final Order Denials



*some matters included whistle-blower claims from multiple claimants

Note: Data was compiled from the SEC’s Office of the Whistleblower’s Final Orders and is current as of Nov. 8, 2016. The data reflects each individual claimant listed in each final order.

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“original”; and the tipster didn’t qualify as a whistle-blower.

A claim for a whistle-blower award must be filed with the SEC’s Office of the Whistleblower within 90 calendar days of the date of the Notice of Covered Action.

Since 2012, 16 claimants lost out on being considered for an award because they didn’t file within the 90-day time frame. According to Thomas, that statistic is surprising because “the SEC does a good job of advising potentially eligible whistle-blowers about filing deadlines.” Bartholomew agreed, saying claimants who miss the filing deadline probably aren’t meritorious, bona fide whistle-blowers.

Hammer offered another take on the missed deadline issue, which he said demonstrates the benefit of retaining legal counsel. “Legal processes are fraught with pitfalls for the uninitiated,” he said. As an added reassurance, if an attorney misses the deadline, it probably would be considered malpractice, Hammer added.

Another requirement for claiming a bounty award is that the information must be “original”—i.e., derived from the whistle-blower’s “independent knowledge” or “independent analysis.” Another caveat to this rule is that the information must have been provided to the SEC for the first time after July 21, 2010, the date Dodd Frank was enacted.

In the past four years, 16 potential whistle-blowers missed the mark because their tips weren’t deemed “original.” In many cases, the information was initially provided before July 21, 2010. The tips can’t be “grandfathered” in, Bartholomew said. You can’t apply for an award based on information provided before the program

was implemented, he said. In 2015, there were six denials for this reason, the most in any year since the program launched.

Finally, an award can be denied because the informant wasn’t a whistle-blower under SEC rules. To be deemed a whistle-blower, the claimant must provide the information voluntarily—a requirement four would-be whistle-blowers have failed to meet over the course of the bounty program. Some examples of involuntary information include information required to be produced pursuant to a subpoena or cooperation agreement, information the individual has a legal duty to disclose, or information the SEC has already asked for, Thomas said.

Risks

Under the Dodd-Frank Act, a whistle-blower’s identity must remain confidential. Although a whistle-blower could remain anonymous and still walk away with a cash prize, there are inherent risks that shouldn’t be taken lightly. Many companies are able to figure out the individual that blew the whistle or narrow it down to a very few suspects, Washington lawyer Daniel J. Hurson, Law Offices of Daniel J. Hurson, told Bloomberg BNA.

The risk of retaliation can come in many not-so-obvious forms, he said in a telephone conversation. If the individual has already left the company, the person can be “black balled” in the industry if his or her identity is exposed, Hurson, who represents whistle-blowers, said. Risks are even greater for whistle-blowers who remain at the company—they can be forced to transfer, ostracized or subjected to other adverse action in their work environment, Hurson said. He said he warns all his clients that the SEC can’t guarantee their confidentiality. Hammer agreed that reporting corporate

misconduct is a risky proposition, saying whistle-blowers often put their careers, personal relationships, health and safety on the line. It can be a tough, long road and “I’ve seen good marriages ruined over it,” he said.

Another risk the claimant faces is that the SEC may already know about the misconduct from other sources, including other whistle-blowers, regulatory examinations and referrals from the self-regulatory organizations, Thomas said. On Nov. 14, the SEC announced a \$20 million bounty to a claimant who enabled the commission to move quickly and obtain a near-total recovery of investors’ funds. However, two other individuals who blew the whistle in connection with the same enforcement action were denied an award, in part because the staff already had some of the information. The other information was provided before the Dodd-Frank Act was passed, the agency said.

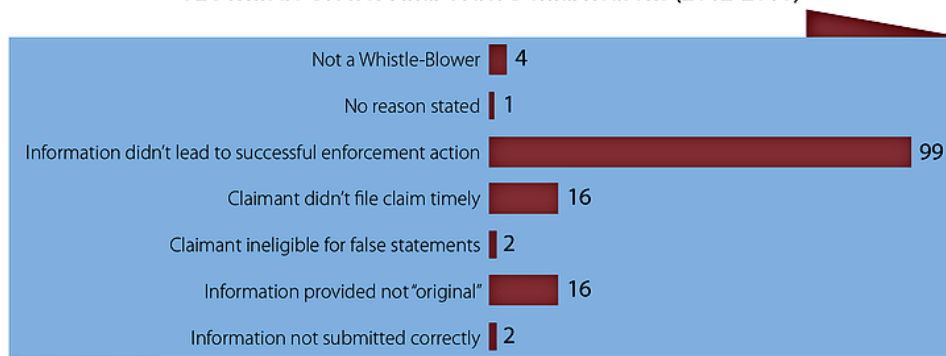
Full Steam Ahead

Overall, the SEC whistle-blower program has taken “full flight” since its inception and has issued several multi-million dollar awards, Bartholomew said.

There’s always going to be a substantial disproportionate effect between the number of tips submitted and the number of awards issued, Bartholomew said. The “good ones” are buried among the volume of tips the agency receives on a daily basis, he said.

Data compiled for the story was pulled from the SEC’s Office of the Whistleblower’s Final Orders and is current as of Nov. 8, 2016. Some orders may have been posted to the website after the cutoff date even if dated prior. The data reflects each individual claimant listed in each final order. Some orders have multiple claimants in connection with the same action.

SEC Whistle-Blower Final Order Denial Reasons (2012-2016)



*some denials include multiple reasons for individual claimants

Note: Data was compiled from the SEC’s Office of the Whistleblower’s Final Orders and is current as of Nov. 8, 2016. The data reflects each individual claimant listed in each final order.

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