

Reproduced with permission from White Collar Crime Report, 13 WCR 189, 03/02/2018. Copyright © 2018 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

WHISTLEBLOWERS

Four Kobre & Kim attorneys discuss whistleblower activity, payments for individuals providing U.S. regulators with certain information, and what sets the U.S. program apart from other countries.

The Right Strategy Is Everything When It Comes to Filing Whistleblower Claims, Especially for Those Outside the U.S.



BY ERIC B. BRUCE, SHAUN Z. WU, WADE WEEMS,
AND FRITZ SCANLON

Whistleblower activity is on the rise worldwide, and so is the potential for individuals to receive massive payouts for information leading to successful enforcement actions by U.S. regulators. For fiscal year 2017 alone, the U.S. government expects to pay more than \$130 million to individuals who blew the whistle on fraudsters to the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC) and Internal Revenue Service (IRS). This figure does not include the *billions* of dollars the U.S. government has paid to individuals under the False Claims

Eric B. Bruce and Shaun Z. Wu are lawyers in the Washington and Shanghai offices, respectively, of Kobre & Kim, a disputes and investigations-focused law firm. Fritz Scanlon and Wade Weems practice the firm's Washington office. They represent whistleblowers from around the globe in strategizing and filing claims to U.S. authorities.

Act—a law that allows individuals to file claims on behalf of the U.S. government against those who have defrauded it.

The U.S. Looks Beyond Its Borders

Traditionally, whistleblower payments have been made largely to individuals within the U.S. Over the past several years, however, U.S. regulators have been increasing their focus on fraudulent conduct, and the related potential whistleblowers, located abroad. This push has been spurred, in part, by the success U.S. regulators have had with tips from abroad. Indeed, in 2014 the SEC used information from a whistleblower located outside the U.S. to bring an enforcement action that resulted in a massive recovery—so large, in fact, that the SEC paid the whistleblower from abroad the largest reward in the history of the SEC's program: approximately \$30 million. The size of the award, which was between 10 percent to 30 percent of the SEC's total recovery, reflected the fact that the whistleblower's information concerned an ongoing fraud that the SEC believed would have otherwise been very difficult to detect.

Also fueling the rise in foreign whistleblower complaints to U.S. regulators is a worldwide increase in laws encouraging whistleblowers to come forward, including legislation passed throughout Asia. In the People's Republic of China, for example, the Supreme People's Procuratorate (SPP), Ministry of Public Security, and Ministry of Finance recently released Several Provisions on Protecting and Rewarding Whistleblowers for Reporting Duty Crimes. These new regulations, which are part of the PRC's larger anti-corruption effort, offer increased protections, as well as certain honorary and monetary awards to whistleblowers who report public corruption through official Chinese governmental channels—typically in the range of RMB 200,000 (\$30,000) and topping out at RMB 500,000 (\$77,000). Other countries in Asia, such as South Korea, Japan, and India have also enacted or proposed legislation that provides increased protections to whistleblowers and, in certain circumstances, modest monetary incentives.

What sets the U.S. whistleblower programs apart, and offers potential whistleblowers in Asia and elsewhere overseas a much greater opportunity to benefit from reporting corporate wrongdoing, is the sheer magnitude of potential monetary rewards and the breadth of the programs' reach. The SEC whistleblower program reaches all companies listed on a U.S. stock exchange. That means that employees of the large number of publicly traded American companies operating in Asia may be eligible for awards if they provide information to the SEC that leads to a successful enforcement action against their employer. Likewise, employees of non-U.S. companies operating in Asia whose ADRs are traded on a U.S. exchange—for example, the New York Stock Exchange—may be eligible. In addition, the SEC whistleblower program covers not only those who blow the whistle on a company's financial fraud, but also individuals who blow the whistle on U.S.-listed companies that pay bribes to non-U.S. government officials—a category of individuals that includes employees of state-owned or state-controlled entities. In late 2016, for example, JPMorgan Chase & Co. agreed to pay more than \$130 million to settle SEC charges that it corruptly influenced government officials in the Asia-Pacific region by giving jobs and internships to their relatives and friends in exchange for business opportunities under the so-called the "Sons and Daughters Program."

The magnitude of individual awards under the various U.S. whistleblower programs also dwarfs the monetary incentives currently offered under non-U.S. programs. Under the SEC's program, a whistleblower will typically get 10 percent to 30 percent of the entire monetary penalty the regulator obtains, so long as that penalty exceeds \$1 million—a figure commonly reached in cases involving financial fraud and virtually always reached in cases involving foreign corruption. Just this past December, for example, the SEC awarded more than \$4.1 million to a non-U.S. national working overseas who alerted the SEC to a multiyear securities fraud at his former employer.

Individual recoveries from other whistleblower activities have likewise been substantial. In April 2016, for example, a Hong Kong-based former employee of Hong Kong corporation Winds Enterprises Ltd., received \$300,000 under the False Claims Act for the essential role he played in uncovering the company's fraudulent evasion of import duties on sportswear imported from

China and Madagascar. And, in one of the most notable awards under the False Claims Act, Dinesh Thakur, a chemical engineer at Indian pharmaceutical company Ranbaxy, received \$48.6 million for blowing the whistle on a massive scheme to falsify information about the safety and effectiveness of Ranbaxy's drugs.

The potential to receive these large awards, coupled with increased local legislation encouraging whistleblowers to come forward, has led to a sharp increase in whistleblower tips to U.S. regulators coming from abroad and, in particular, from Asia. In fiscal year 2017, approximately 12 percent of all SEC whistleblower complaints (more than 550) came from outside the United States, up from 464 in 2016. Of those complaints, about a quarter originated in Asia. Tips to the SEC from mainland China and Hong Kong nearly doubled from 2016 to 2017, rising from 36 to 62. And in South Korea, the increase was even more dramatic, as the number of tips quintupled from two to 10. The most common SEC whistleblower complaints involved fraudulent corporate disclosures and financials, offering fraud, and market manipulation. About 5 percent related to Foreign Corrupt Practices Act violations.

The number of whistleblower tips to the CFTC is likewise increasing sharply. In 2017, the CFTC saw a 70 percent increase in whistleblower tips from the year before. These tips and complaints concerned a wide range of activities with potential connections to Asia, including virtual currency trading, spoofing and other forms of disruptive trading, misrepresentations to customers regarding the handling of their accounts, fraud involving foreign currency exchange, and Ponzi schemes.

Tips for Potential Whistleblowers

To maximize the chances of obtaining an award, potential whistleblowers should, first and foremost, carefully evaluate whether a claim is likely to succeed and ensure that they submit their claims properly and effectively. Experienced counsel can help a whistleblower decide whether and how to blow the whistle, including whether to report wrongdoing internally before or at the same time the individual reports to the U.S. regulator. Counsel who regularly handles these matters will also help the whistleblower draft the complaint in a fashion that grabs the regulator's attention, while ensuring that the whistleblower himself does not have any potential exposure. The more specific and credible the complaint, the higher the chance of success. Whistleblowers should also seek counsel to navigate the often years-long process of providing additional information to the U.S. regulator and cooperating in the claim's investigation and prosecution, which also serves to increase the amount of their ultimate award.

Potential whistleblowers should also act quickly. Timing is critical to a claim's success and the award's size. To be eligible for an award under most U.S. whistleblower programs, a whistleblower must provide "original" information to the regulator—that is, information not already known to the regulator. If another individual provides a regulator with the potential whistleblower's information first, the potential whistleblower may be blocked from collecting an award. Moreover, even if a potential whistleblower is the first to report information of wrongdoing to a regulator, timeliness is still important. The SEC and other U.S. regulators consider the timeliness of information in cal-

culating an award's size (i.e., where on the 10 percent to 30 percent spectrum of total recovery it should fall). Finally, regulators are more likely to take action when information is timely, as they have limited resources to investigate the many whistleblower reports they receive each year. Regulators therefore often focus on tips regarding ongoing fraud that they can stop or recent fraud that they can punish to deter future fraudsters, and they are far less likely to act on tips about speculative fraud that occurred years ago.

Whistleblowers should also be mindful of the significant protections the U.S. whistleblower programs offer. Under the SEC and CFTC whistleblower programs, for example, an individual may submit complaints anonymously, and the regulators will protect the whistleblower's identity. This anonymity can continue through the entire process, including in the event an award is paid. Announcements of awards to anonymous whistleblowers do not identify the award recipient and contain no information that would allow the individual to be identified.

Finally, potential whistleblowers should be mindful of the factors that U.S. regulators consider when determining the award's size. The SEC and CFTC, for example, will increase the award amount based on factors such as the significance of the information provided to the regulator, the extent of assistance the whistleblower provides, and the extent to which the whistleblower participated in the company's internal compliance sys-

tem. The SEC and CFTC often encourage whistleblowers to blow the whistle internally at the same time they blow the whistle to the U.S. government and to cooperate with any internal investigation the company undertakes. Thus, whistleblowers should weigh the benefits of reporting internally against the risks of drawing attention to themselves.

The SEC and CFTC also weigh certain factors in deciding whether to *reduce* a whistleblower reward. Those factors include whether the whistleblower interfered with the company's internal compliance system, whether the whistleblower was involved in or guilty of any of the unlawful conduct, and, as mentioned above, whether the whistleblower delayed unreasonably in reporting the unlawful conduct. In weighing this final factor, the SEC and CFTC consider whether the whistleblower failed to take reasonable steps to report the violation or prevent it from occurring or continuing, whether the whistleblower was aware of the violation but reported it to the regulator only after learning of an investigation into it, and whether a legitimate reason existed for the whistleblower's delay in reporting the violation. Thus, a potential non-U.S. whistleblower should carefully consider precisely how and when to blow the whistle to a U.S. regulator to maximize any award. Again, experienced counsel in this tricky regulatory arena can often make the difference in a successful whistleblower claim.

Supplementary Graphic

	The SEC Whistleblower Reward Program	The CFTC Whistleblower Reward Program	The IRS Whistleblower Reward Program	The False Claims Act, Qui Tam Actions
Type of information sought	Information about past or current violations of U.S. securities laws.	Information about violations of the Commodity Exchange Act, for example, spoofing, market manipulation, fraud involving foreign currency exchanges, etc.	Information about tax fraud that results in the collection of taxes, penalties, or interest from a noncompliant U.S. taxpayer.	Information about fraud regarding U.S. government programs or contracts, presented by whistleblowers in lawsuits filed on behalf of the government.
Determining the justification for an award	The information must lead to a successful SEC action resulting in an order of monetary sanctions exceeding US \$1 million.	The information must lead to a successful CFTC action resulting in an order of monetary sanctions exceeding US \$1 million.	The information must lead to judicial or administrative action resulting in the collection of taxes owed to the U.S. government.	The information presented in the filer's lawsuit must not already be known to the government or be the subject of another lawsuit, and the government must recover money from the defendant as a result of the lawsuit.
Determining the size of the award	Award can be 10%–30% of the monetary sanctions collected in actions	The total amount of an award for an eligible enforcement action is 10%–30%	If amount in dispute is US \$2 million or more, or concerns an individual with gross	Award can be 15%–25% of government's recovery, if

brought by the SEC and related actions brought by certain other regulatory and law enforcement authorities.	of the amount of monetary sanctions collected in the CFTC's enforcement action (or qualifying related action).	income of US \$200,000 or more: 15%–30%; otherwise: up to 15%.	government joins the lawsuit, or 25%–30% of government's recovery if government declines to join.
---	--	--	---