

FEATURE



Surge in Whistleblower Complaints Should Prompt Compliance Checkups

By Brad Mroski, Lindsay Redman, and Ted Stafford

A potent set of circumstances has created a perfect storm in the world of whistleblower complaints. The COVID-19 pandemic caused significant disruption for most companies, and some internal control environments were upended by the sudden and dramatic shifts in operations. At the same time, with large numbers of professionals working remotely, employers lost early visibility into workplace issues, quick access to concerns, and the ability in many cases to conduct prompt and thorough internal investigations. Meanwhile, the US Securities and Exchange Commission (SEC) recently clarified and amended certain provisions

of its successful whistleblower program, further highlighting the need for executives and boards to take a fresh look at their companies' compliance efforts.

With the risk of whistleblowers approaching regulators increasing, organizations that develop a comprehensive approach to respond to complaints arising internally will find themselves better positioned if they are ultimately faced with a crisis. What's more, if a complaint does draw regulatory scrutiny, the SEC and other law enforcement agencies have shown a willingness to recognize swift and credible action taken by companies, such as by standing

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down while allowing internal investigations to run their course, reducing data and document requests, and in some cases offering significantly reduced sanctions when violations are detected.

The SEC's fiscal year ending Sept. 30, 2020, was one for the record books. The agency received 6,911 whistleblower tips (see Figure 1). This was a 33 percent increase over 2019 and a 31 percent increase over 2018, making it the second highest single fiscal year for whistleblower tips (since surpassed by still-to-be completed 2021 results).

The vast majority of those 6,911 tips in 2020 were related to corporate disclosures and financials. These allegations often are among the largest categories of whistleblower tips. To wit: the 1,710 corporate disclosures and financials tips received by the SEC last year represented a whopping 54 percent increase over 2019.

Moreover, two of the 10 largest individual awards in the program's history came in 2020 (Figure 2), and the total awards amounted to \$175 million (Figure 3). The number of awarded individuals also hit a

record last year, with nearly five times the number of awards in 2019.

This trajectory of SEC whistleblower awards has continued into the current fiscal year that began Oct. 1. Just past the halfway point, whistleblower awards to 46 individuals total almost \$250 million, inclusive of the two largest awards ever issued (\$114 million and \$50 million). With almost six months to go, 2021 is already the largest year in the program's history in terms of amounts and individuals awarded. This means that nearly \$425 million—more than 50 percent of the cumulative amounts ordered since the inception of the whistleblower program—has been awarded in the past 18 months (Figure 3).

CHANGES TO THE SEC'S PROGRAM

Amendments adopted by the SEC in September were designed to add both transparency and efficiency to the whistleblower program. Among other changes, the SEC announced a new mechanism for whistleblowers with potential awards of under \$5 million—which has historically amounted to nearly 75 percent of all whistleblower

awards—to qualify for a presumption that they will receive the maximum statutory award amount. Higher awards would be subject to the discretion of the SEC, without a hard or soft cap on the amount.

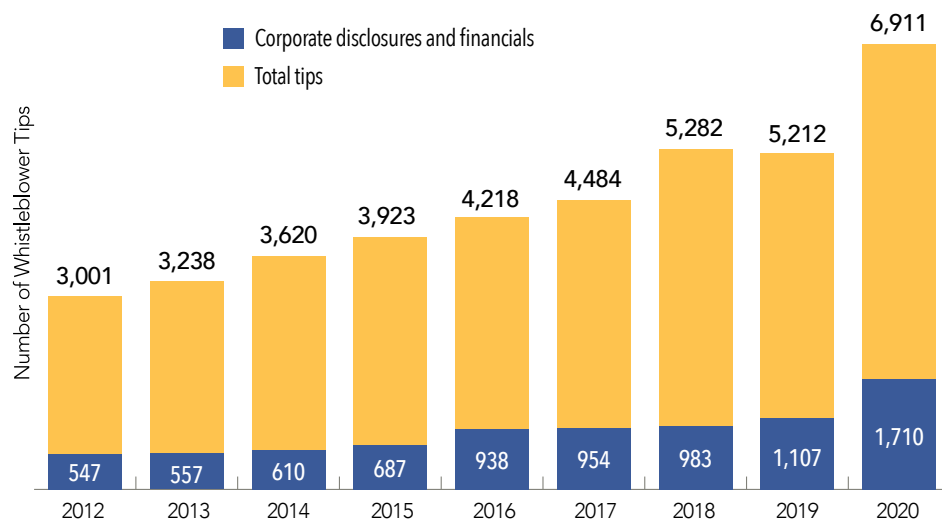
A second change was to ensure that whistleblowers would not be disadvantaged because of the particular form of action that the SEC or the US Department of Justice chooses to pursue. Under the amendment, whistleblowers would be able to receive awards even based on money collected as a result of deferred and non-prosecution agreements, as well as under settlement agreements entered into outside of a judicial or administrative proceeding to address violations of the securities laws.

ASSESS CURRENT STATE

Organizations can prepare for this increased emphasis on reporting, especially as a growing number of factors signal a more enforcement-focused SEC that is willing to take on hot-button disclosure issues, which lend themselves to higher levels of whistleblower interest. Certainly, the SEC's appetite for accounting and reporting cases remains high, and newly confirmed Chair Gary Gensler, who previously headed the Commodity Futures Trading Commission during the Obama administration, has publicly shown support for whistleblower programs.

To prepare, organizations should assess their current states. Negative contributing factors often cited by the SEC include a poor tone set by company management, a high-pressure environment, and a lack of adequately experienced personnel. Board members and management should therefore be attuned to both the quantitative and qualitative measures of their companies' compliance efforts, with the understanding that business challenges frequently presented in enforcement cases—for example, pressure to meet analyst expectations, increased supplier costs, and slowing demand

FIGURE 1 RECORD YEAR FOR WHISTLEBLOWER TIPS IN 2020



Source: AxiPartners analysis based on SEC reports

for products—are exacerbated in times of economic and business disruption. Boards should also consider the following questions:

- Are compliance and accounting groups staffed adequately and with competent personnel?
- Do compliance groups have a seat at the table on important operational decisions?
- How well do compliance programs hold up when tested with significant transactions?
- Has the compliance program evolved with operational changes related to COVID-19 and subsequent work-from-home arrangements?
- Are emerging issues and trends related to SEC reporting and enforcement being monitored?
- Has the effectiveness of the compliance program been tested, and are potentially problematic activities being caught?
- Are reporting lines well defined and appropriate from a risk management perspective?
- Is leadership setting the right tone, and is that tone being communicated adequately?
- Are policies and procedures well documented and easy to understand, and are employees sufficiently trained on them?
- Are internal reporting mechanisms available and sufficiently promoted to those both inside and outside the organization?

PLAN BEFORE A CRISIS HITS

Effective internal reporting structures and ownership that triage complaints appropriately can help catch and fix problems early. Similar to the practice of engaging in fire drills, organizations should consider establishing a plan to manage potential complaints before they occur. Such a plan should consider the following:

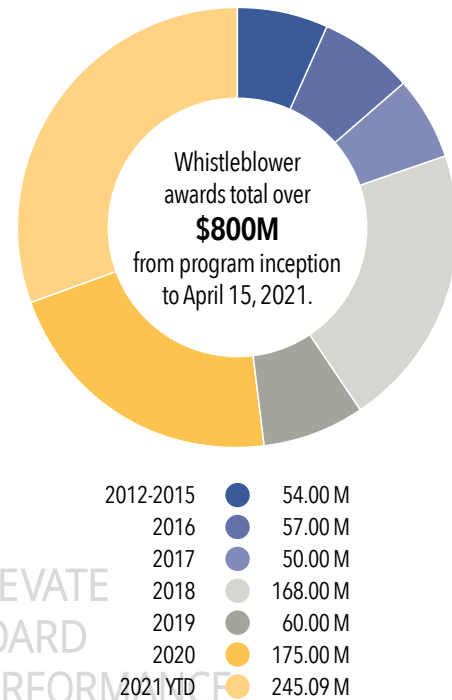
- Routing of complaints by issue type. If the complaint relates to executives, financial reporting, or accounting, it should go directly to the audit committee or independent members of the board.
- Identification of which internal resources will be involved in an investigation. Decide which complaints will be handled internally versus outsourced for an independent review.
- Document and information preservation in the event of a complaint. Identify relevant sources of information and a plan for data preservation.
- Tracking and case management procedures.

FIGURE 2
10 LARGEST SEC
WHISTLEBLOWER
AWARDS

\$114M
Oct. 22, 2020
\$50M
April 15, 2021
\$50M
June 4, 2020
\$50M
March 19, 2018
\$39M
Sept. 6, 2016
\$37M
March 26, 2019
\$33M
March 19, 2018
\$30M
Sept. 22, 2014
\$28M
Nov. 3, 2020
\$27M
April 16, 2020

Source: AlixPartners analysis based on SEC reports

FIGURE 3 SEC AWARDS TO INDIVIDUALS
SINCE PROGRAM BEGAN (IN DOLLARS)



Source: AlixPartners analysis based on SEC reports

- A list of credible external advisors at the ready.
- In consultation with advisors, having a framework to determine if and when self-reporting to regulatory agencies may be appropriate.
- Protocols to guard against potential retaliation claims by whistleblowers.

Reviewing best practices and addressing any potential gaps now will put the organization in a better position to respond to possible complaints that are raised internally while also increasing the chances of a favorable outcome in cases where regulatory scrutiny is involved. It also assures employees and other stakeholders that management and the board take complaints seriously and that internal reporting is a viable means for them to communicate any concerns. [D](#)

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