

HB | Legal Report Series

THE SEC WHISTLEBLOWER

10 STEP GUIDE *to*
REPORTING *and*
REWARDS

About this Guide

The Securities and Exchange Commission is the federal government agency regulating trading on the various U.S. stock exchanges. Its mission is to ensure that investors meet on a level playing field, that trading is honest, and that crooked individuals or companies do not manipulate the process for personal gain.

But let's face it: the SEC exists because cheating exists. Insider trading, "pump and dump" schemes, Ponzi schemes, and other varieties of fraud victimize thousands of investors each year. Many of these crimes would go undetected if not for insiders coming forward and blowing the whistle on illegal activity. Because whistleblowing is vital to regulatory enforcement, Congress created the SEC whistleblower program in 2010, authorizing cash rewards for unique and helpful information related to securities fraud. In just 10 years, the SEC whistleblower program has received more than 33,300 tips, leading to \$2 billion in sanctions for violations, and more than \$500 million in rewards to whistleblowers.

If you are a company insider with unique knowledge of wrongdoing, you need to know about the SEC Whistleblower Program. This short guide explains what you need to know about filing a claim and obtaining a sizeable reward. In just 10 easy steps, you can strike a blow for justice and earn more in a few short months than you could have in your entire career, all while protecting your anonymity and job.

A concise, informative overview of how to:

- Select the proper whistleblower program
- Gather evidence and protect your claim

- Navigate the whistleblower claims process
- Maximize your cash award

10 Steps *to* SEC Whistleblower Rewards

Step One: Do I Really Want to Do This?	5
Step Two: Consult an Attorney	6
Step Three: Building the Case	7
Step Four: Business as Usual	9
Step Five: Drafting and Filing	10
Step Six: Working with the SEC	11
Step Seven: Settlement or Trial	12
Step Eight: Negotiating Your Reward	13
Step Nine: Preparing for Retaliation	14
Step Ten: Spending Your Reward	15
 About Halperin Bikel PLLC	 16

Step One: Do I Really Want to Do This?

Before deciding whether to blow the whistle on an employer, you've got to ask yourself some questions. Is what you have observed at your company an actual SEC violation? You don't have to try the case in your head, deliberating through sleepless nights until you can return a doubtless verdict. But what is your gut telling you? You wouldn't have reached your current position without basic instruction in securities law and professional ethics.

For some folks, an objective wrong is enough to prompt them to come forward. But most of us need to be sure that coming forward is the right move for us. So, here are a few subjective questions to ask:

Do you like being associated with this kind of behavior? You might say, "Hey, I'm not the one setting policy," and be okay with that, even if others associate you with the wrongdoing. On the other hand, you might feel that living with your conscience demands that you separate yourself from the wrongdoing. And, rather than feeling miserable while you do nothing, blowing the whistle would allow you to feel good about putting an end to illegal behavior that is damaging to the greater economy and corrosive to our civil society.

Are you comfortable in the role of "informant"? Nobody wants to be labeled a "rat," but you didn't sign up to be a soldier in the Corleone crime family. Ask yourself whether people who are cheating innocent investors deserve your loyalty? Or do you belong on the side of those hard-working people whose retirement savings are being jeopardized so a handful of crooks can make a quick buck?

You are also entitled to ask, “**What’s in it for me?**” The monetary rewards of whistleblowing can be substantial, anywhere from 10 to 30 percent of the amount of the government’s recovery. You might make many times more than you would in the normal course of your professional career. The fact that you can be anonymous and protect your career might convince you to at least “give it a shot.”

Finally, there’s no playing *Hamlet* with the SEC. Since the whistleblower program only rewards original information, you’ve got to be first to file. If you spend too much time asking, “To be or not to be,” someone else from your company with the same information could step forward, and it would be curtains for your claim.

Now, if you’ve made your mind up that whistleblowing is the right course of action, you might still want to give your company a chance to make things right before filing a claim with the SEC. But, please, don’t do that until you’ve taken the next step.

Step Two: Consult an Attorney

By sitting down with an SEC whistleblower attorney, you can dispel any lingering doubts and get insight into how your whistleblower action might play out. It’s important to choose an accomplished attorney to ensure you’re getting accurate and reliable advice, not just theoretically about the law, but about the real-life process.

An attorney can evaluate the potential of your case, telling you:

- Whether your case involves a regulatory violation
- Whether the violation is significant enough to warrant SEC interest

- The steps you must take to build the case
- How to protect yourself against retaliation on the job
- Whether it's advisable in your situation to urge your company to correct the problem

The SEC only accepts cases with a potential for a million-dollar-plus recovery. An experienced attorney can help you build a case that will get the SEC's attention by advising you on the type of evidence you must assemble. Finally, the SEC whistleblower program has some of the most robust protections available, but to remain anonymous, you must have attorney representation.

Step Three: Building the Case

In your initial meeting with the whistleblower attorney, you probably won't be able to do much more than sketch out the case. However, the goal is to prove a knowing and deliberate scheme to violate SEC regulations. Legally speaking, that's more like a color portrait of a smoking gun suitable for hanging in the Louvre. Your attorney can tell you what evidence you must collect to make your sketch come to life, such as:

- Internal memos
- Emails
- Trading data
- Brokerage records
- Other relevant documents

Your attorney will want to construct a timeline that suggests motive and intent. You will want to keep a record of your day-to-day activities and insights. You want to compile a list of potential witnesses along with their

contact information. Be aware that your company may suspect you're acting as a whistleblower.

Although they may not punish you directly, they may find a pretext for changing out your company-owned devices and distancing you from relevant information. For that reason, you should store your whistleblowing records on devices that you own and make hard copies you can keep in a secure place. The attorney can also advise you on how to proceed carefully and professionally, so you don't compromise your whistleblower protection or expose yourself to legal liability. You must limit your search of company documents to items that are germane to the case. Removing trade secrets or confidential personnel files invites legal trouble. Your whistleblower protection will not extend to violations of company policy or the law, so going rogue and rummaging through your CEO's desk can definitely get you fired.

You must also be aware of your state's laws for using recording devices. Some states allow you to record a party without their knowledge; others do not. Some states allow you to record someone without their knowledge, but only in an area where they do not have a reasonable expectation of privacy. Your attorney can clarify all of these issues, so you can assemble the necessary evidence without tipping your hand or opening a legal avenue for your employer to retaliate.

Throughout the case-building process, your attorney is accessible to answer questions, give guidance, and deliver a pep talk whenever necessary.

Being a whistleblower is, for all intents and purposes, an undercover operation. So, you've got to keep a low profile. If you've raised objections to company practices in the past, you want to give the impression you've reconciled yourself to the situation. This doesn't require a big production,

which probably would come off as disingenuous. But a muted, “Whatever, it is what it is,” can go a long way.

You need to have the same access to company communications and documents you had when you discovered the misconduct. More, if possible. You don’t want to raise suspicions that will get you reassigned, especially if your higher-ups get wind of an investigation.

People react differently to their new espionage gig. Some enjoy the intrigue and relish the excitement. Others have difficulty keeping their lunch down. The key is to maintain composure and stick to the plan your attorney has laid out for you. In your enthusiasm, don’t get ahead of yourself and take the initiative on actions you haven’t discussed with your attorney. If nervous tension is troubling you, talk to a psychologist about strategies to get you through the next few weeks. Remember, this too will pass, and the future will be brighter because of the steps you took.

Step Four: Business as Usual

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Step Five: Drafting and Filing

There are three major considerations for filing a whistleblower claim with the SEC:

- **Be first** — The SEC's whistleblower law only rewards original claims, so you have to file before anyone else with the same knowledge of the violation.
- **Hit the target** — Your case must meet the threshold for a minimum \$1 million recovery if you are to receive a reward for your information.
- **Make an impact** — The SEC has complete discretion to prosecute the claims it chooses. If they don't pick yours, you're out of luck because the SEC program does not allow you to take action on your own. Your case must demand attention.

An experienced whistleblower attorney knows how to balance these three elements, especially timeliness and impact. You don't want to rush to file before you have crucial evidence and a polished draft that could boost your impact. But you don't want to fuss so much with details that someone else beats you to the courthouse.

As for impact, that's where the art and science of the law meet. In real estate, they call it curb appeal: a home so attractive to passersby that it practically sells itself. As for whistleblower cases, you must have what the U.S. Attorneys are hungry for luscious, mouth-watering, low-hanging fruit. First and foremost, attorneys for the SEC want to see big cases that are slam dunks, so that they can make headlines with a limited allotment of resources. That means presenting compelling evidence of wrongdoing in a clear and convincing narrative. This is another reason to choose a lawyer with a successful track record of similar cases.

Step Six: Working with the SEC

If the SEC accepts the case, you're off and running. The SEC has subpoena powers, so they can:

- Demand documents
- Serve interrogatories
- Interview potential witnesses and defendants

Most whistleblower cases have some gaps because most whistleblowers aren't in a position to know absolutely everything about a company's misconduct. Though bound together by persuasive documentary and testimonial evidence, the initial cases often rely on logical assumptions based on the larger situation. In other words, circumstantial evidence. But, through the discovery process, the SEC attorneys can access the hard evidence needed to fill those gaps.

During the actual investigation, you might not have much to do, other than answering questions related to your filing. Your attorney will prepare you ahead of time and accompany you to any interview. You won't face any kind of cross-examination, because your anonymity is protected. But it's important

to recognize that the level of assistance you give during the investigation can be the key to increasing your reward from the 10 percent level up closer to 30 percent. So, you should continue to accumulate evidence even after your filing, and be available to help SEC investigators interpret what they're finding.

Step Seven: Settlement or Trial

When the SEC decides to take a case, the pressure on the company ratchets up. The company and culpable individuals can face civil and criminal sanctions. Common civil penalties include:

- Injunctions prohibiting further conduct that violate the law or SEC rules
- An injunction requiring audits or special supervisory arrangements
- Monetary penalties for violations
- Disgorgement, *i.e.*, the return of illegally obtained profits

The penalties available for individuals can destroy a career. The court can bar or suspend a culpable individual from serving as a corporate officer or director. Anyone violating such an order can be charged with contempt of court, drawing fines and possible imprisonment.

SEC investigators also work with law enforcement to determine whether criminal charges are warranted. State and federal authorities can bring charges against individuals for violating substantive law, *e.g.*, committing fraud, or for process crimes, *e.g.*, obstruction of justice or perjury.

The SEC gives the defendant companies every opportunity to avoid trial through a negotiated settlement. Company officers have every incentive to save what's left of their careers and avoid jail by cooperating. The result is

often a generous recovery for the government in exchange for settling all allegations against the company and the officers as individuals.

Step Eight: Negotiating Your Reward

When the SEC and your company reach a settlement agreement, you'll know that amount of the government's recovery, but not the level of your reward, which can range from 10 to 30 percent of the recovery fund. So how does the SEC decide how big a slice of the pie you get?

The SEC looks at your overall performance in the case and decides where your reward should lie on the spectrum. Factors the SEC looks at include:

- **The value of the information you provided** — The greatest consideration here is the link between your information and the settlement. Did your filing give the SEC an inkling that something might be wrong, or did you hand them a smoking gun with corporate fingerprints all over it?
- **The amount of damage resulting from the company's misconduct** — If a lot of people had been harmed, but the government couldn't make a case, the outcry would have been deafening. Being an instrument of justice under those circumstances is highly valuable.
- **The extent to which you helped during the investigation** — Often, investigators won't know what they're looking at until an insider interprets it for them. If you guided SEC investigators through their document review, providing important insights, your contribution would be of much greater value than if you simply filed a claim.
- **The extent to which you participated in the misconduct** — The

cleaner your hands are, the more inclined SEC will be to reward you. If you grudgingly went along with policy for a short period, you're in a better position than if you concocted the scheme.

- **The timeliness of your claim** — SEC complaints generally have a five-year statute of limitations, but the farther in time you get from the commission of an offense, the harder it is to prosecute. If you had information that you sat on for years, you're not going to look so innocent, especially if you profited during that time.

Rather than sit back and wait for the SEC to make an offer, your attorney must make a case for the highest percentage award possible given your level of participation. Maximizing your reward is probably the most important task for your attorney.

Step Nine: Preparing for Retaliation

You should begin this step during your initial meeting with your attorney. For obvious reasons, it's much more likely you'll face retaliation after the case concludes. Especially if you show up for work in the new Maserati you purchased with your reward. But even if the bosses can't pin you down as the whistleblower, you may be lumped with other suspects and targeted for mistreatment.

Federal law protects you from retaliatory practices—being passed over for promotion, demoted, or fired—but companies may try to make these actions seem as though they are based on job performance. So, brace yourself for unfavorable performance reviews.

Your whistleblower attorney will guide you through this process, protect your rights, and perhaps even win you additional compensation for your troubles.

Step Ten: Spending Your Reward

Starting at the minimum of 10 percent of \$1 million, an SEC whistleblower award makes for a fine windfall. A new home, car, fabulous vacations—we could go on and on. What you spend your reward on is entirely your business. Our one tip is this: don't spend it until you've got it. Remember, the case has to be successful, and many an apparent slam-dunk has been jammed off the rim as time expired. So, be hopeful, but don't be foolish.

If you still have questions about what it takes to become a whistleblower, or if you're ready to begin the process, contact Halperin Bikel, PLLC. We've aided in the recovery of more than \$10 billion in state and federal whistleblower cases. We have the knowledge you need to build a case that gets results.

About Halperin Bikel PLLC

Representing New York Whistleblowers in New York and throughout the United States

Whistleblowers, perhaps more than anyone else, need an experienced attorney to protect and advocate their rights, from retaliation protection through stopping fraud and maximizing government rewards.

We hope you find this information helpful. If you are considering becoming a whistleblower or have questions about any of the several programs or about your information or job please call us at Halperin Bikel at 929.290.1266.

Our subject matter experts and legal team will help you evaluate your circumstances from every side so you will have the best information on your risks and opportunities.

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