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OFFICE OF THE WHISTLEBLOWER: A SLOW BEGINNING

While the long-term efficacy of the bounty program offered by the SEC's Office of the Whistleblower is still unclear, as the Office enters its fourth year it is safe to say that its progress thus far has been slow. The Office was created after the SEC's repeated dismissal of valuable information that could have exposed Bernie Madoff's Ponzi scheme years before it was finally put to a stop.¹ This very public debacle made it evident that the SEC was not equipped to handle the volume of whistleblower tips it was receiving, and a new vehicle would be needed to process tips and separate the proverbial wheat from the chaff. A product of the 2010 Dodd-Frank legislation,² the Office of the Whistleblower is designed to serve this function and help the SEC "act swiftly to protect investors from harm and bring violators to justice."³

Despite this lofty goal, the Office has taken time to gain footing. During 2011, the inaugural year of the program, no awards were paid out.⁴ With only one whistleblower receiving an award in fiscal year 2012⁵ and four in 2013,⁶ the number of payouts has remained low. Although some practitioners take the view that these initial payments have set a precedent and will lead to a "tidal wave of cases coming as a result of whistleblowers,"⁷ it is hard to deny that these numbers are underwhelming. This is not, however, due to a lack of

¹ See generally Allan Chernoff, *Madoff Whistleblower Blasts SEC*, CNNMONEY (February 4, 2009, 1:29 PM), http://money.cnn.com/2009/02/04/news/newsmakers/madoff_whistleblower/.

² See 15 U.S.C. § 78u-7 (2012). Subsection (d) directs the SEC to create the body that is now known as the Office of the Whistleblower.

³ U.S. SECURITIES AND EXCHANGE COMMISSION, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2013), at 1, available at: <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf> (last visited January 18, 2014).

⁴ U.S. SECURITIES AND EXCHANGE COMMISSION, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2011 (2011), at 8, available at: <http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf> (last visited January 18, 2014). The Office began work in the second half of 2011 and attributes the lack of payouts in 2011 to procedures that prevented the timely reviewing of claims until the following year.

⁵ U.S. SECURITIES AND EXCHANGE COMMISSION, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2012 (2012), at 8, available at: <http://www.sec.gov/about/offices/owb/annual-report-2012.pdf> (last visited January 18, 2014).

⁶ 2013 ANNUAL REPORT, *supra* note 3, at 14. The Office paid an award to an additional whistleblower after the close of fiscal year 2013, bringing the total published number of awards to six. *Id.* at 14–15.

⁷ See Walter Pavio, *What the SEC Whistleblower Report Means for Companies*. FORBES (Nov. 18, 2013, 12:51 PM), <http://www.forbes.com/sites/walterpavlo/2013/11/18/sec-releases-whistleblower-report-here-is-what-it-means-for-companies/> (quoting Jordan Thomas, Partner and Chair of the Whistleblower Representation Practice, Labaton Sucharow).

people coming forward with information. Although the number of payouts remains in the single digits, the yearly report the Office provides to Congress indicates that the total number of tips received is in the thousands. In 2011 the Office received 334 tips (note that the 2011 data only covers a seven-week period), followed by 3,001 in 2012 and 3,238 in 2013.⁸ This discrepancy between the large amount of tips received and the comparatively small number of payouts might be the result of the somewhat disconnected relationship the Office maintains with the rest of the SEC, including its Division of Enforcement.

Contrary to what one might expect, the Office is not directly involved in enforcement actions against corporate wrongdoers. According to Sean McKessy, the Office's Chief, when the Office receives a tip it is looked at by a team of SEC "attorneys, accountants, and analysts,"⁹ including "at least two SEC attorneys."¹⁰ These are the individuals that decide whether the tip has merit. When a tip is found to have no merit or is otherwise unhelpful, that will end the matter and the tip provider will likely never receive any communication from the Office. If the tip is potentially helpful, but the SEC's Enforcement Division is already investigating the matter, the tip is turned over to that division, and that is likely the end of the Office's involvement.¹¹ Although the Office is careful to show Congress that it is making use of its dedicated funds,¹² it is not clear that successful enforcement actions resulting from quality tips directly figure into Congress' assessment of the Office's viability.

When a tip is found meritorious and eventually leads to a new investigation by the applicable division within the SEC, this is a process that can "take months or even years" to be completed.¹³ Notably, the Office is under no obligation to advise whistleblowers as to the progress or outcome of any investigation it pursues. The burden is on the tip provider to continually check the Office's website for a Notice of Covered Action until the tipster recognizes a case involving their tip.¹⁴ Furthermore, the tip provider has only a ninety-day

⁸ 2013 ANNUAL REPORT, *supra* note 3, at 8.

⁹ Sean McKessy, *What Happens to Tips*, SEC OFFICE OF THE WHISTLEBLOWER <http://www.sec.gov/about/offices/owb/owb-what-happens-to-tips.shtml> (last visited April 12, 2014).

¹⁰ *Id.*

¹¹ *Id.*

¹² *See generally* ANNUAL REPORT'S, *supra* notes 3, 4, and 5.

¹³ Sean McKessy, *supra* note 9.

¹⁴ *Id.*

window to claim their reward after the Notice is posted.¹⁵ This requirement of diligence on the part of the tip provider, when coupled with the low likelihood of receiving an award, may prove a further deterrent for those with valuable information to contact the Office.

The possibility of receiving a cash bounty can only go so far in encouraging individuals to come forward with potentially valuable information. For the Office's bounty program to succeed, it needs to communicate to the public that its goal is not simply to generate more tips. The Office instead needs to show that it can quickly separate useless tips from quality information, and then efficiently funnel this information to the applicable branch of the SEC. The Office can only truly be considered a success when it becomes evident that the number of tips the Office receives directly correlates to an increased number of productive investigations and effective enforcement actions.

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¹⁵ *Id.*

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