

# 5 Takeaways From The SEC's Annual Whistleblower Report

By **Jane Norberg and Adam Reinhart** (December 2, 2022)

On Nov. 15, the U.S. Securities and Exchange Commission's Office of the Whistleblower issued its annual report for fiscal year 2022.[1]

The same day, the SEC announced its enforcement results for fiscal year 2022, which highlighted the Office of the Whistleblower as an "integral part" of the enforcement program and the whistleblower program as a critical tool in the SEC's enforcement arsenal.[2]

The SEC's fiscal year 2022 whistleblower report reveals that whistleblower tips remain an important source for SEC investigations and enforcement actions that companies and their counsel cannot ignore. Below are our top five takeaways from the report, including observations based on Jane Norberg's time as chief of the SEC's Office of the Whistleblower.



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## 1. Record Number of Tips

The SEC reported that it had received 12,322 whistleblower tips in fiscal year 2022.[3] This was the largest number of tips received in any year in the history of the SEC's whistleblower program, which was established in 2011 following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[4]

During the two prior fiscal years, there had been dramatic increases in the number of tips received — from 5,212 in fiscal year 2019, to 6,911 in fiscal year 2020, to 12,210 in fiscal year 2021.[5] Although the reason for the increasing number of tips was not clear, one possible explanation was that the prevalence of remote and hybrid working conditions made it easier for whistleblowers to gather evidence and report out to the SEC, such as by taking screenshots of documents or communications.

But even as many companies have begun to bring employees back into the office, the number of tips reported out to the SEC has remained very high and may reflect a new normal.

Companies should consider conducting risk assessments to test their internal reporting structures and review internal reporting data. If tips are not being received, consideration should be given to conducting surveys and training to determine why internal structures are not being utilized.

For example, there is particular risk that middle managers may be receiving information from their direct reports but not passing it on through appropriate channels.

## 2. Substantial Whistleblower Awards Equate to Substantial Corporate Impact

Fiscal year 2022 was a significant year for both whistleblower awards and monetary sanctions issued as a result of whistleblower tips. Fiscal year 2022 trailed only fiscal year 2021 in the size and number of awards to whistleblowers, with the SEC doling out approximately \$229 million in 103 awards.[6]

In addition, successful enforcement actions brought as a result of whistleblower tips have yielded more than \$6.3 billion in total monetary sanctions ordered since the beginning of the whistleblower program, including more than \$1.3 billion during fiscal year 2022 alone.[7]

The incentives for whistleblowers to report potential misconduct remains high, as does the cost to companies that violate the securities laws. Companies therefore should ensure that they have appropriate internal reporting frameworks that allow for the identification and investigation of internal tips.

Conducting a thorough investigation and engaging in appropriate remediation can help position a company to respond effectively to an enforcement investigation and minimize potential sanctions, particularly in light of the SEC's announced focus on recognizing meaningful cooperation and remediation while punishing and deterring misconduct.[8]

The receipt of an internal whistleblower report, if handled correctly, is the first step toward potential cooperation and remediation credit.

### **3. Whistleblower Impeding Cases are Expanding and are now the Bread and Butter of the Whistleblower Office**

The SEC continues to bring enforcement actions to protect whistleblowers and has expanded the scope of Rule 21F-17 cases.

The SEC has now brought a total of 16 actions against companies and individuals for violating Rule 21F-17, which prohibits taking steps "to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement." [9]

Two of these 16 actions were brought in fiscal year 2022, and the enforcement of Rule 21F-17 continues to be a focus of the commission.[10] Indeed, during a recent panel discussion, the chief of the SEC's Office of the Whistleblower, Cree Kelly, explained that Rule 21F-17 impeding cases are now bread-and-butter cases for the office.[11]

One of the two new cases brought in fiscal year 2022 also reflected an expansion of the scope of conduct that the commission will pursue in Rule 21F-17 cases.

Specifically, in *In the Matter of David Hansen*, the SEC found that a company's chief information officer violated Rule 21F-17 when he removed a whistleblower employee's access to the company's information technology systems, which was seen as impeding the whistleblower's communications with the SEC.[12]

Also in fiscal year 2022, the U.S. District Court for the Southern District of New York granted summary judgment to the commission in *SEC v. Collector's Coffee Inc.*, which was a first of its kind Rule 21F-17 action that involved language in confidentiality provisions of investor documents.[13]

In light of the SEC's expanded use of Rule 21F-17, companies should carefully review corporate documents and policies to ensure that there is nothing the SEC might construe as impeding the ability of potential whistleblowers from reporting possible wrongdoing to the commission.

This includes investor documents, which may not have been considered previously, as well

as severance agreements, confidentiality agreements, compliance manuals and training materials, among others. Companies also should carefully consider any steps taken after an employee raises concerns internally or externally.

As evidenced by the Hansen case, even seemingly routine actions might lead to charges in certain circumstances.

#### **4. Initial Coin Offerings and Crypto Heating Up**

When submitting tips, whistleblowers are asked to characterize the nature of their allegations.[14] In prior years, the top three categories of whistleblower allegations have been manipulation, offering fraud and corporate disclosures and financials.[15]

In fiscal year 2022, however, initial coin offerings and cryptocurrencies replaced corporate disclosures and financials in the top three and was the third most common category of allegations, representing 14% of all complaints.[16] In fact, the number of ICO and crypto tips has more than doubled in each of the prior two years — from 345 in fiscal year 2020, to 762 in fiscal year 2021, to 1,718 in fiscal year 2022.[17]

As tips can be a lagging indicator, it is likely that similar increases will be seen in the number of enforcement investigations and actions involving ICOs and crypto. This would also be consistent with developments in the crypto market as well as the SEC's May 2022 announcement that it was renaming the Cyber Unit as the Crypto Assets and Cyber Unit, and nearly doubling the size of the unit.[18]

#### **5. International Reach of the Program**

As in prior years, the SEC's whistleblower program continues to have a global reach. According to the fiscal year 2022 whistleblower report, tips were received from all over the world, with the highest number of foreign tips originating from Canada, the U.K., Germany, China, Mexico and Brazil.[19]

As the whistleblower program expands in prominence across the globe, companies with activities overseas should take care to ensure that the prospect of foreign SEC whistleblowers is considered in connection with internal compliance policies, procedures and training. This can be particularly important when local cultural norms discourage whistleblowing.

In addition, the SEC continues to receive tips from all types of whistleblowers. This includes individuals who were involved with or witnessed wrongdoing, compliance officers whose companies declined to act, and outsiders who identified potential wrongdoing through research and analysis of publicly available information.[20]

#### **Conclusion**

The SEC's fiscal year 2022 whistleblower report is a healthy reminder that encouraging and incentivizing whistleblowers remains a priority for the commission. Whistleblower tips continue to be a fruitful source for enforcement investigations and actions and have led to billions of dollars of monetary sanctions.

In today's aggressive enforcement environment, companies need to be proactive and have appropriate mechanisms in place to identify and promptly investigate and correct any potential misconduct before it is reported to the SEC.

The focus by the SEC and other government agencies and regulators on cooperation and remediation place internal whistleblower reports front and center in risk management.[21] Companies that ignore internal whistleblowers do so at their peril.

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***Disclosure: While at the SEC, author Jane Norberg participated in several of the cases discussed in this article.***

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[1] [https://www.sec.gov/files/2022\\_ow\\_ar.pdf](https://www.sec.gov/files/2022_ow_ar.pdf) ("FY 2022 Whistleblower Report").

[2] <https://www.sec.gov/news/press-release/2022-206>.

[3] FY 2022 Whistleblower Report at 5.

[4] Id.

[5] Id.

[6] Id. at 1.

[7] Id. ("Enforcement actions brought using information from meritorious whistleblowers have resulted in orders for more than \$6.3 billion in total monetary sanctions, including more than \$4.0 billion in disgorgement of ill-gotten gains and interest . . . ."); [https://www.sec.gov/files/2021\\_ow\\_ar\\_508.pdf](https://www.sec.gov/files/2021_ow_ar_508.pdf) ("FY 2021 Whistleblower Report") at 1 ("Since the program's inception, enforcement matters brought using information from meritorious whistleblowers have resulted in orders for nearly \$5 billion in total monetary sanctions . . . .").

[8] <https://www.sec.gov/news/press-release/2022-206>.

[9] FY 2022 Whistleblower Report at 6; 17 C.F.R. §§ 240.21F-17(a).

[10] FY 2022 Whistleblower Report at 6-7.

[11] Securities Enforcement Forum 2022 (Nov. 15, 2022).

[12] <https://www.sec.gov/enforce/34-94703-s>; see also <https://www.law360.com/articles/1483783/sec-s-interpretation-of-tipster-protection-rule-stirs-debate>.

[13] SEC v. Collector's Coffee Inc., No. 19-cv-04355, 2021 WL 5360440 (S.D.N.Y. Nov. 17,

2021); see also <https://www.arnoldporter.com/en/perspectives/advisories/2022/02/in-case-of-first-impression>.

[14] FY 2022 Whistleblower Report at 5.

[15] See, e.g., FY 2021 Whistleblower Report at 29; [https://www.sec.gov/files/2020\\_owb\\_annual\\_report.pdf](https://www.sec.gov/files/2020_owb_annual_report.pdf) ("FY 2020 Whistleblower Report") at 28.

[16] FY 2022 Whistleblower Report at 5-6.

[17] *Id.* at 6; FY 2021 Whistleblower Report at 29; FY 2020 Whistleblower Report at 28. Interestingly, the number of tips within every other category declined from FY 2021 to FY 2022, with the exception of Offering Fraud (which increased slightly from 1,910 to 2,042). Nonetheless, in most categories, the number of tips during FY 2022 remained well above the number from two years earlier.

[18] <https://www.sec.gov/news/press-release/2022-78>.

[19] FY 2022 Whistleblower Report at 6.

[20] *Id.* at 1-2.

[21] See, e.g., Lisa Monaco, Deputy Attorney General, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.