



2018 ANNUAL REPORT TO CONGRESS

# Whistleblower Program



U.S. SECURITIES AND EXCHANGE COMMISSION

#### D I S C L A I M E R

This is a report of the Staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or conclusions contained herein.

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## MESSAGE FROM THE CHIEF OF THE OFFICE OF THE WHISTLEBLOWER

Fiscal Year (FY) 2018 was a record-breaking year for the U.S. Securities and Exchange Commission's (SEC or Commission) whistleblower program. The whistleblower program continued to grow and make substantial contributions to the Commission's enforcement and investor protection efforts. The Commission ordered its largest whistleblower awards to date this past fiscal year. In fact, the Commission awarded more dollars in FY 2018 to meritorious whistleblowers who provided new and critical information than in all prior years combined. The Commission also received more whistleblower tips in FY 2018 than in any other previous year.

While the dollars awarded and volume of tips received are reflections of the program's success, we are most proud of the program's added value in the protection of the Main Street investor. Since the program's inception, the SEC has ordered wrongdoers in enforcement matters brought with information from meritorious whistleblowers to pay over \$1.7 billion in total monetary sanctions, including more than \$901 million in disgorgement of ill-gotten gains and interest, of which approximately \$452 million has been, or is scheduled to be, returned to harmed investors.

Finally, FY 2018 also saw proposed changes to the program's implementing regulations (Whistleblower Rules), following the Supreme Court's ruling in *Digital Realty Trust, Inc. v. Somers*<sup>1</sup> (*Digital Realty*), as well as other changes proposed by the Commission.

### ***Substantial Dollars Awarded in Fiscal Year 2018***

The Commission has awarded over \$326 million to 59 individuals since the beginning of the whistleblower program. In FY 2018 alone, the SEC awarded more than \$168 million in whistleblower awards to 13 individuals whose information and cooperation assisted the Commission in bringing successful enforcement actions. This amount exceeds the total amount awarded in all prior years combined and reflects the significance of the information that whistleblowers are reporting to the Commission.

In addition, the SEC made two of its largest-ever whistleblower awards this past fiscal year—a total combined \$83 million award shared by three individuals, and an award of almost \$54 million shared by two individuals. The recipients of these large awards provided significant information regarding serious violations that otherwise may have gone unnoticed and resulted in substantial enforcement actions.

### ***Prioritizing Meritorious Claims***

The main goal of the whistleblower program is to incentivize the reporting of specific, timely, and credible information to the Commission. Therefore, one of the top priorities of the Office of the Whistleblower (OWB) has been, and will continue to be, processing meritorious award claims. As such, OWB prioritizes those claims that, based on our initial triaging and communications with investigative staff, appear to be award-eligible.

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1 138 S. Ct. 767 (2018).

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component in the success  
of the Commission’s  
whistleblower program.”

As demonstrated by the awards made this fiscal year, meritorious whistleblowers have, among other things, helped the Commission by alerting the agency to widespread, multi-year securities violations, and supplying information and documentation of violations that impacted retail customers. Meritorious whistleblowers in FY 2018 were diverse and included, among others, a company outsider and whistleblowers residing or working overseas. We hope that by rewarding whistleblowers who provide valuable information to the Commission staff, more individuals will come forward and report information of securities violations, which in turn, helps the Commission better protect investors and the marketplace.

#### ***Increase in Whistleblower Tips Received in Fiscal Year 2018***

The Commission received over 5,200 whistleblower tips in FY 2018. This represents the highest increase in tips since the beginning of the program—a nearly seventy-six percent increase since FY 2012. Additionally, there was an increase in tips received in the months following the Supreme Court ruling in the *Digital Realty* case, which may have been attributable, in part, to the ruling.

#### ***Whistleblower Protections in Fiscal Year 2018***

In *Digital Realty*, the Supreme Court held that the whistleblower provisions of the Securities Exchange Act of 1934 (Exchange Act) require that a person report a possible securities law violation to the Commission in order to qualify as a whistleblower protected against employment retaliation under Section 21F(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), thus invalidating the Commission’s rule interpreting that provision’s anti-retaliation protections to apply regardless of whether a report of possible securities law violations was made to the Commission, to a different government agency, or internally to an employer. The ruling resolved a Circuit Court split regarding whether individuals who had reported only to their employers, rather than to the Commission, were protected under Dodd-Frank’s anti-retaliation protections. This is a significant change in whistleblower protections, and potential whistleblowers should be mindful of this ruling when deciding when to report their concerns to the Commission. Following the ruling, the Commission proposed amendments to bring the Whistleblower Rules in line with the holding of the Court.

Anti-retaliation protections continue to be a critical component in the success of the Commission’s whistleblower program. Individuals who fear reprisal from their companies for reporting will be less likely to bring their information to the Commission. Supporting enforcement actions against companies and individuals who retaliate against whistleblowers or take actions to impede whistleblowers’ communications with the Commission will remain a focus of OWB’s mission in the upcoming fiscal year. We will continue to work to ensure that whistleblowers can freely report information to the Commission without fear of reprisal.

***Proposed Amendments to Whistleblower Rules***

Capitalizing on its nearly seven years of experience administering the whistleblower program, the Commission proposed amendments to the Whistleblower Rules during FY 2018 to build upon the success of the program. In addition to clarifying the requirements for anti-retaliation protection under the whistleblower statute, the proposed amendments would provide the Commission with additional discretion in making whistleblower awards to ensure that meritorious whistleblowers are appropriately rewarded for their efforts and increase efficiencies in the whistleblower claims review process.

The proposing release was published in the Federal Register on July 20, 2018, and the comment period ended on September 18, 2018.<sup>2</sup> Pages 26–28 of this report provide a fuller discussion of the proposed rule amendments.

***Conclusion***

The impact of the whistleblower program on the Commission's enforcement efforts and its contributions to the protection of Main Street investors continue to be strong. We are proud of the accomplishments of the whistleblower program in FY 2018. We look forward to the enduring success of the program in the years ahead.

We encourage those who believe they have credible information concerning a potential federal securities law violation to expeditiously submit a tip via the Commission's online portal ([www.sec.gov/whistleblower](http://www.sec.gov/whistleblower)).

If individuals or their counsel have any questions about the program, including questions about how to submit a tip to the Commission, we encourage them to call OWB's whistleblower hotline at (202) 551-4790.

**JANE NORBERG**

Chief, Office of the Whistleblower  
November 15, 2018

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<sup>2</sup> Amendments to the Commission's Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018).

## HISTORY AND PURPOSE

Dodd-Frank<sup>3</sup> amended the Exchange Act<sup>4</sup> by, among other things, adopting Section 21F,<sup>5</sup> entitled “Securities Whistleblower Incentives and Protection.” Section 21F directs the Commission to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful Commission enforcement actions resulting in monetary sanctions over \$1 million and successful related actions.<sup>6</sup>

“It is OWB’s mission to administer a vigorous whistleblower program that will help the Commission identify and halt securities frauds early and quickly to minimize investor losses.”

Awards must be made in an amount equal to 10 to 30 percent of the monetary sanctions collected.<sup>7</sup> To ensure that whistleblower payments would not diminish the amount of recovery for victims of securities law violations, Congress established a separate fund, called the Investor Protection Fund (Fund), from which eligible whistleblowers are paid.

The Commission established OWB, an office within the SEC’s Division of Enforcement (Enforcement), to administer and effectuate the whistleblower program. It is OWB’s mission to administer a vigorous whistleblower program that will help the Commission identify and halt securities frauds early and quickly to minimize investor losses.

In addition to establishing an awards program to encourage the submission of high-quality information, Dodd-Frank and the Commission’s Whistleblower Rules<sup>8</sup> also establish confidentiality protections for whistleblower submissions,<sup>9</sup> including the ability to file a whistleblower tip anonymously with the assistance of an attorney. Employers are prohibited from retaliating against whistleblowers for providing information to the Commission.<sup>10</sup> The Commission’s proposed rule amendments would modify the Whistleblower Rules to comport with the ruling in the *Digital Realty* case that an employee must report possible securities law violations to the Commission to qualify for protection against retaliation.<sup>11</sup>

Dodd-Frank’s Section 924(d) requires OWB to report annually to Congress on OWB’s activities, whistleblower complaints received, and the response of the Commission to such complaints.<sup>12</sup> In addition, Section 21F(g)(5) of the Exchange Act requires the Commission to submit an annual report to Congress that addresses the following subjects:

- The whistleblower award program, including a description of the number of awards granted and the types of cases in which awards were granted during the preceding fiscal year;
- The balance of the Fund at the beginning of the preceding fiscal year;

3 Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010).

4 15 U.S.C. § 78a, *et seq.*

5 *Id.* § 78u-6.

6 “Related actions” is defined at 15 U.S.C. § 78u-6(a)(5) and 17 C.F.R. § 240.21F-3.

7 15 U.S.C. § 78u-6(b)(1).

8 17 C.F.R. §§ 240.21F-1 through 21F-17.

9 *Id.* § 240.21F-7.

10 15 U.S.C. § 78u-6(h)(1).

11 See Amendments to the Commission’s Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018).

12 15 U.S.C. § 78u-7(d).





- The amounts deposited into or credited to the Fund during the preceding fiscal year;
- The amount of earnings on investments made under Section 21F(g)(4) during the preceding fiscal year;
- The amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to Section 21F(b);
- The balance of the Fund at the end of the preceding fiscal year; and
- A complete set of audited financial statements, including a balance sheet, income statement, and cash flow analysis.<sup>13</sup>

OWB, in consultation with other offices within the Commission, has prepared this report, which covers the period October 1, 2017 through September 30, 2018, to satisfy the reporting requirements of Section 924(d) of Dodd-Frank and Section 21F(g)(5) of the Exchange Act. The sections in this report addressing the activities of OWB, the whistleblower tips received during FY 2018, and the processing of whistleblower tips primarily address the requirements of Dodd-Frank's Section 924(d). The sections addressing the Fund and whistleblower incentive awards made during FY 2018 primarily address the requirements of Section 21F(g)(5) of the Exchange Act.

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<sup>13</sup> 15 U.S.C. § 78u-6(g)(5).

## ACTIVITIES OF THE OFFICE OF THE WHISTLEBLOWER

Section 924(d) of Dodd-Frank directed the Commission to establish a separate office within the Commission to administer and enforce the provisions of Section 21F of the Exchange Act. Jane Norberg heads the Office as Chief of OWB. There are two Assistant Directors and twelve attorneys who are dedicated to the work of the Office, including, among other things, processing award claims, as well as an attorney devoted to communications with the public. OWB is also staffed by four paralegals and an administrative assistant. Following is an overview of OWB's primary responsibilities and activities over the past fiscal year.

### *Assessment of Award Applications*

The whistleblower program was designed, in part, to provide monetary incentives to individuals with relevant information concerning potential securities violations to report their information to the Commission. As such, much of OWB's work relates to the assessment of claims for whistleblower awards.

OWB posts a Notice of Covered Action (NoCA) on its webpage ([www.sec.gov/whistleblower/claim-award](http://www.sec.gov/whistleblower/claim-award)) for every Commission enforcement action that results in monetary sanctions of over \$1 million. Those individuals who have submitted whistleblower tips pursuant to the program's requirements and whose information significantly advanced the particular investigation that led to the Covered Action may submit an application in response to a posted NoCA.

Although it is ultimately a whistleblower's responsibility to make a timely application for an award, OWB may contact whistleblowers who have been actively working with investigative staff—or who have previously contacted OWB about the posting of a particular Covered Action—to confirm they are aware of the posting and applicable deadline for submitting claims for award.

Based on an initial review, as well as communications with the relevant investigative staff, OWB prioritizes those claims that appear to be award-eligible. OWB attorneys assess the application and the eligibility of the claimant and confer with relevant investigative or other Commission staff to understand the contribution of the claimant, if any, to the success of the Covered Action. OWB then makes recommendations to the Claims Review Staff, currently comprised of five senior officers in Enforcement, as to award eligibility. Pages 9–15 of this report provide a fuller explanation of how applications for awards are processed at the Commission, as well as what awards were made during this past fiscal year.

### ***Advancing Anti-Retaliation Protections and Combating Efforts to Impede Reporting***

OWB identifies and monitors whistleblower complaints alleging retaliation by employers or former employers in response to an employee's reporting of possible securities law violations. The Commission may bring an enforcement action against companies or individuals who violate the anti-retaliation provisions of Dodd-Frank. But, in a change from prior years, such enforcement actions can only be brought when a whistleblower reports to the Commission. This change reflects the Supreme Court's ruling in *Digital Realty* regarding who qualifies as a whistleblower covered by Section 21F(h)'s anti-retaliation protections, which is discussed more in depth at pages 18–19 of this report. OWB continues to view anti-retaliation protections as a high priority to ensure that whistleblowers can report to the Commission without fear of reprisal. OWB will continue to work with investigative staff to identify cases where companies take reprisals for whistleblowing efforts that may be appropriate for enforcement action.

In addition, OWB monitors the usage of confidentiality, severance, and other kinds of agreements, or engagement in other practices, to interfere with individuals' ability to report potential wrongdoing to the SEC. Exchange Act Rule 21F-17(a) provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcement, or threatening to enforce, a confidentiality agreement...with respect to such communications."<sup>14</sup> OWB continues to work closely with investigative staff to identify and investigate practices in the use of confidentiality and other kinds of agreements, or other actions, that may violate Rule 21F-17(a).

### ***Intake of Whistleblower Tips***

The Commission's Tips, Complaints, and Referrals Intake and Resolution System (TCR System) serves as a central repository for all tips and complaints received by the Commission, as well as referrals from self-regulatory organizations and other government agencies. In January 2018, the Commission released an updated, more user-friendly version of the TCR System. OWB encourages all individuals to submit their whistleblower tips and any additional information electronically through the Commission's online portal. There are several benefits of using the online portal, including the fact that individuals receive an immediate acknowledgement of their submission along with a confirmation number. The tip is also automatically populated in a queue for staff who triage tips and complaints. For greater efficiency and quicker review, OWB recommends electronic submission over hard-copy submission.

For more information on the number and types of tips received, please refer to pages 20–23 of this report.

“OWB continues to view anti-retaliation protections as a high priority to ensure that whistleblowers can report to the Commission without fear of reprisal.”

<sup>14</sup> 17 C.F.R. § 240.21F-17(a).

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of the public.”

### ***Communications with Whistleblowers***

OWB serves as the primary liaison between the Commission and individuals who have submitted information or are considering whether to submit information to the agency concerning a possible securities violation. OWB created a whistleblower hotline, in operation since May 2011, to respond to questions from the public about the whistleblower program. Individuals may leave messages on the hotline by calling (202) 551-4790. All calls to the hotline are returned by OWB attorneys within 24 business hours.

During FY 2018, the Office returned nearly 2,770 phone calls from members of the public. Since the hotline was established, OWB has returned over 21,380 calls from the public.

Many of the calls OWB receives relate to how the caller should submit a tip to be eligible for an award, how the Commission will maintain the confidentiality of a whistleblower's identity, requests for information on the investigative process or tracking an individual's complaint status, and whether the SEC is the appropriate agency to handle the caller's tip. OWB provides a menu of options with answers to frequently asked questions on the voicemail hotline.

In addition to communicating with the public through the hotline, the Office communicates with whistleblowers who have submitted tips, claims for awards, and other correspondence to OWB.

### ***Public Outreach and Education***

One of OWB's primary goals is to promote public awareness of the Commission's whistleblower program. As part of that outreach effort, the Office aims to promote the program and educate the public about the program through OWB's webpage ([www.sec.gov/whistleblower](http://www.sec.gov/whistleblower)). The webpage contains information about the program, copies of the forms required to submit a tip or claim an award, a listing of enforcement actions for which a claim for award may be made, links to helpful resources, including a section dedicated to retaliation-related issues, and answers to frequently asked questions.

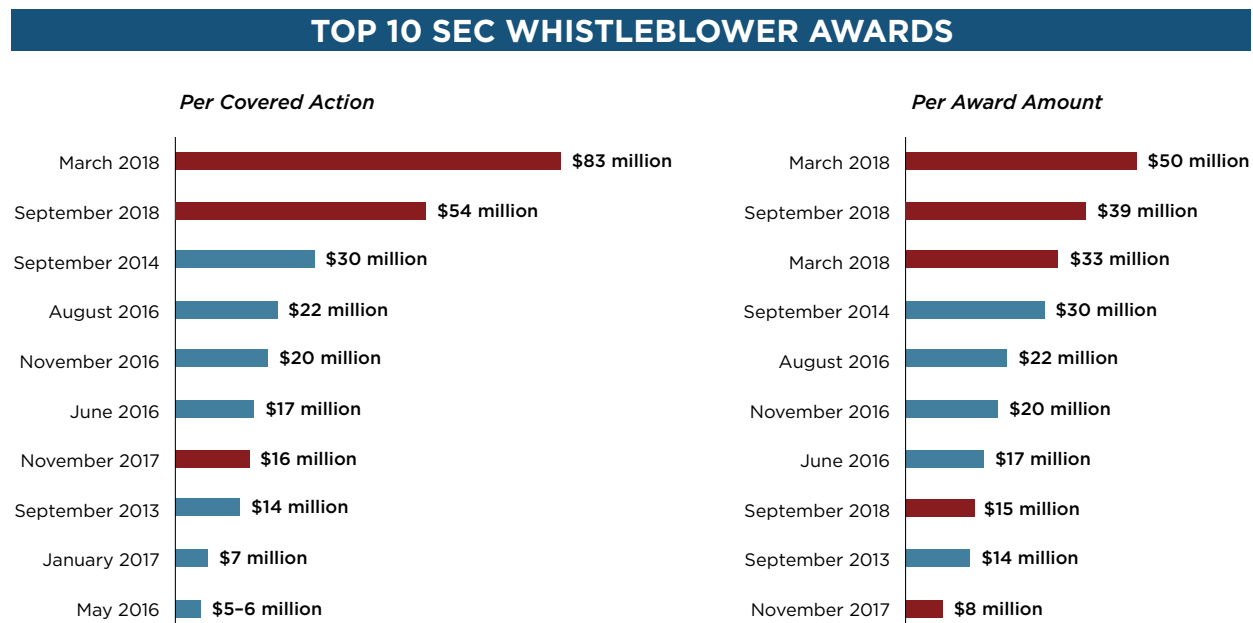
OWB also actively participates in numerous webinars, media interviews, presentations, press releases, and other public communications. In FY 2018, OWB participated in many public engagements aimed at promoting and educating the public about the Commission's whistleblower program. The Office's target audience generally includes potential whistleblowers, whistleblower counsel, and corporate compliance counsel and professionals. OWB's Chief also participates in legal panels and other forums with other federal agencies with similar whistleblower programs.

## CLAIMS FOR AWARDS

### Whistleblower Awards Made in Fiscal Year 2018

In FY 2018, the Commission ordered whistleblower awards of approximately \$168 million to 13 individuals, each of whom voluntarily provided original information that either led to the opening of an investigation or significantly contributed to a successful enforcement action.

Below are the top ten highest awards made under the SEC's whistleblower program both by Covered Action (*i.e.*, considering all awards made within a single Covered Action) and by award amount through FY 2018. The awards highlighted in red were made this past fiscal year.



From program inception to end of Fiscal Year 2018, the SEC awarded over \$326 million to 59 individuals.

The Commission's \$83 million award in March 2018 included an almost \$50 million joint award to two individuals, which is also the Commission's highest award to date, as well as an award of \$33 million to a third individual. The Commission also made a \$54 million award in September 2018, with a \$39 million award to one individual, and a \$15 million award to a second individual.

Below is an overview of the whistleblower awards made by the Commission during the past fiscal year.

***Three Individuals Receive Largest-Ever Awards Totaling Almost \$83 Million***

On March 19, 2018, the Commission announced two of its largest-ever whistleblower awards, with two individuals sharing a nearly \$50 million joint award and another whistleblower receiving more than \$33 million.<sup>15</sup> The first two individuals jointly provided significant information that prompted the Commission to open the first of two investigations and ongoing assistance that saved the Commission a substantial amount of time and resources. The third individual supplied the Commission with additional information that initiated and acted as the cornerstone of the Commission's second investigation resulting in the Covered Action.

***More Than \$54 Million to Two Whistleblowers***

On September 6, 2018, the Commission announced an award of more than \$54 million to two whistleblowers, \$39 million to one whistleblower and \$15 million to another, whose critical information and continued assistance helped the agency bring an important enforcement action.<sup>16</sup> The \$39 million award is the second-largest individual award in the history of the program.

***More Than \$16 Million Awarded to Two Whistleblowers***

On November 30, 2017, the Commission announced an award of more than \$16 million to two whistleblowers.<sup>17</sup> The first whistleblower alerted the staff to the particular misconduct that was the focus of the staff's investigation and the cornerstone of the subsequent action and provided continuing assistance, including the identification of potentially relevant documents and witnesses. The second whistleblower provided additional significant information and ongoing cooperation to the staff during the investigation that saved a substantial amount of time and agency resources.

***Former Company Insider and Foreign National Receives \$4.1 Million Award***

On December 5, 2017, the Commission announced an award of more than \$4.1 million to a former company insider who both alerted the Commission to a widespread, multi-year securities law violation and continued to provide important information and assistance throughout the SEC's investigation.<sup>18</sup> The whistleblower was a foreign national working outside of the United States.

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<sup>15</sup> See Order Determining Award Claim, Exchange Act Rel. No. 82897, File No. 2018-6 (Mar. 19, 2018); SEC Press Rel. No. 2018-44, "SEC Announces Its Largest-Ever Whistleblower Awards."

<sup>16</sup> See Order Determining Award Claim, Exchange Act Rel. No. 84046, File No. 2018-11 (Sept. 6, 2018); SEC Press Rel. No. 2018-179, "SEC Awards More Than \$54 Million to Two Whistleblowers."

<sup>17</sup> See Order Determining Award Claim, Exchange Act Rel. No. 82181, File No. 2018-2 (Nov. 30, 2017); SEC Press Rel. No. 20187-216, "More Than \$16 Million Awarded to Two Whistleblowers."

<sup>18</sup> See Order Determining Award Claim, Exchange Act Rel. No. 82214, File No. 2018-3 (Dec. 5, 2017); SEC Press Rel. No. 2017-222, "Former Company Insider Earns More Than \$4.1 Million for Whistleblower Tip."



### ***Nearly \$4 Million to Overseas Whistleblower***

On September 24, 2018, the Commission announced an award of nearly \$4 million to an overseas whistleblower whose tip prompted the Commission to open an investigation.<sup>19</sup> The whistleblower provided continuing and extensive assistance that helped the Commission bring a successful enforcement action.

### ***\$2.2 Million Award to Whistleblower Who First Reported to Another Federal Agency Before the SEC***

On April 5, 2018, the Commission announced an award of more than \$2.2 million to a former company insider who first reported the information to another federal agency but later provided the same information to the SEC, which helped the SEC bring the successful action.<sup>20</sup> This was the first award paid under the “safe harbor” of Exchange Act Rule 21F-4(b)(7), which provides that if a whistleblower first submits information to another federal agency but submits the same information to the SEC within 120 days, the SEC will treat the information as though it had been submitted to the SEC at the same time that it was submitted to the other agency.

### ***Former Company Insider Receives \$2.1 Million Award***

On April 12, 2018, the Commission announced an award of more than \$2.1 million to a former company insider who provided information that led to multiple successful enforcement actions and who provided ongoing assistance during the investigation.<sup>21</sup>

### ***Award of Approximately \$1.5 Million***

On September 14, 2018, the Commission announced an award of more than \$1.5 million to a whistleblower who provided the SEC with vital information and ongoing assistance that proved important to the overall success of the enforcement action.<sup>22</sup>

### ***Award of More Than \$1 Million***

On October 12, 2017, the Commission announced an award of more than \$1 million to a company outsider who provided new information and substantial corroborating documentation of a securities law violation by a registered entity that impacted retail customers.<sup>23</sup>

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19 See Order Determining Award Claim, Exchange Act Rel. No. 84270, File No. 2018-13 (Sept. 24, 2018); SEC Press Rel. No. 2018-209, “SEC Awards Almost \$4 Million to Overseas Whistleblower.”

20 See Order Determining Award Claim, Exchange Act Rel. No. 82996, File No. 2018-8 (Apr. 5, 2018); SEC Press Rel. No. 2018-58, “SEC Awards More Than \$2.2 Million to Whistleblowers Who First Reported Information to Another Federal Agency Before SEC.”

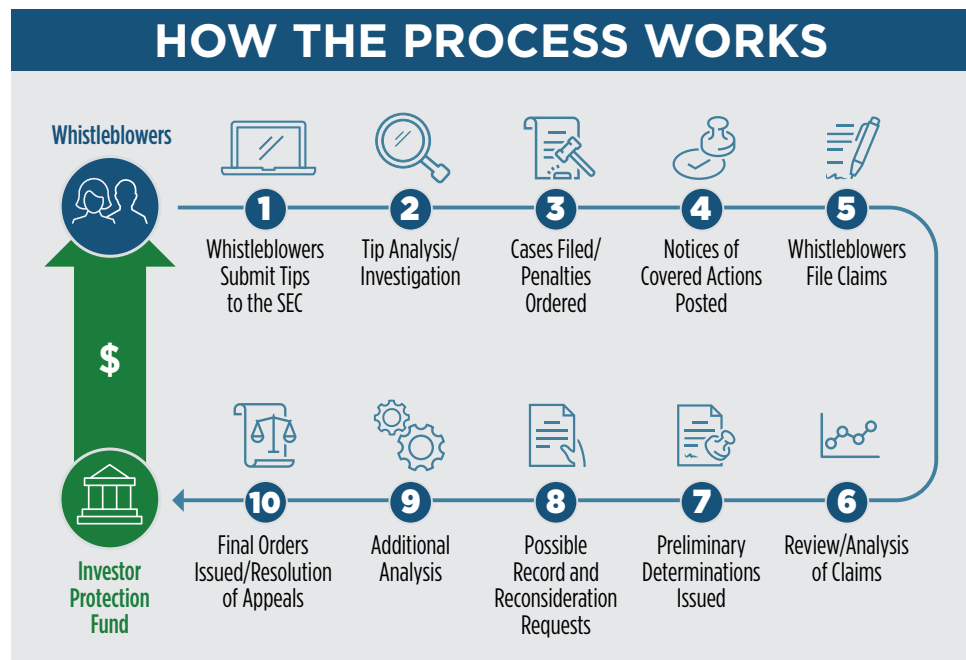
21 See Order Determining Award Claim, Exchange Act Rel. No. 83037, File No. 2018-9 (Apr. 12, 2018); SEC Press Rel. No. 2018-64, “SEC Awards Whistleblower More Than \$2.1 Million.”

22 See Order Determining Award Claim, Exchange Act Rel. No. 84125, File No. 2018-12 (Sept. 14, 2018); SEC Press Rel. No. 2018-194, “Whistleblower Receives Award of Approximately \$1.5 Million.”

23 See Order Determining Award Claim, Exchange Act Rel. No. 81857, File No. 2018-1 (Oct. 12, 2017); SEC Press Rel. No. 2017-195, “SEC Announces Whistleblower Award of More Than a Million Dollars.”

### Overview of Award Process

For a whistleblower to receive an award, there are a number of preconditions that must be met. The diagram below provides a snapshot of the overall process, from the filing of the whistleblower tip to payment of the whistleblower award. As reflected, the time between the submission of a whistleblower tip and when an individual may receive an award payment can be several years, particularly where the underlying investigation is especially complex, where there are multiple, competing award claims, or where there are claims for related actions. OWB undertakes extensive due diligence to ensure a careful and thorough evaluation of all award claims.



The discussion below focuses on the award claims process, from the posting of the NoCA (Step #4 above) to the issuance of a Final Order by the Commission (Step #10 above).

### NoCA Posted

OWB posts on its webpage a NoCA for each Commission enforcement action where a final judgment or order, by itself or together with other judgments or orders in the same action issued after July 21, 2010, results in monetary sanctions exceeding \$1 million.<sup>24</sup> During FY 2018, OWB posted 142 NoCAs.

OWB sends email alerts to GovDelivery when the NoCA listing is updated.<sup>25</sup> Whistleblowers and other members of the public may sign up to receive an update via email every time the list of NoCAs on OWB's webpage is updated. OWB posts new NoCAs on its webpage on the last business day of each month.

<sup>24</sup> By posting a NoCA for a particular case, the Commission is not making a determination either that a whistleblower tip, complaint, or referral led to the Commission opening an investigation or filing an action with respect to the case or that an award to a whistleblower will be paid in connection with the case.

<sup>25</sup> GovDelivery is a vendor that provides communications for public-sector clients.



### ***Whistleblowers File Claims***

Once a NoCA is posted, claimants have 90 calendar days to apply for an award by submitting a completed award application on Form WB-APP to OWB.<sup>26</sup> Only claimants who have a clear nexus between the information they submitted on their whistleblower tip to the Commission and the charges in the underlying action should apply for an award in any given matter. In making that determination, claimants are encouraged to (i) consider whether they had any communications with the relevant Enforcement staff who brought the action and (ii) review the relevant charging documents and consider the proximity between the Commission's specific charges and the claimant's tip. As discussed in more detail at pages 26–28 of this report, the proposed amendments to the Whistleblower Rules include tools that could deter frivolous claims, which drain resources and slow down the review process for meritorious claims. Frivolous claims can substantially complicate and delay the award process.

While OWB endeavors to contact whistleblowers who have worked with investigative staff to inform them of the application deadline, it is the responsibility of the claimant to make a timely application for award. The Commission has denied late-filed award claims. The Court of Appeals for the Second Circuit upheld the Commission's denial of two claimants whose award applications were submitted approximately two years after the required deadline.<sup>27</sup> As such, OWB encourages whistleblowers and their counsel to regularly review the monthly NoCA postings or to sign up to receive emails to alert them as to when new NoCAs are posted.

### ***Review and Analysis of Award Claims***

Based on an initial review of the award application and in consultation with investigative staff, OWB makes a preliminary assessment of the whistleblower claim. In keeping with OWB's goal of processing meritorious claims, claims that appear to be eligible for an award are prioritized for processing.

OWB attorneys evaluate each application for a whistleblower award. In addition to analyzing the information provided by the claimant on the Form WB-APP, OWB attorneys look at prior correspondence between the claimant and the Commission and consult intra-agency databases to understand the origin of the case and what tips or other correspondence the claimant may have submitted to the Commission. In addition, whenever possible, OWB attorneys work closely with investigative staff responsible for the relevant action, and/or other Commission staff who may have interacted with the claimant or have other relevant knowledge, to understand the contribution or involvement the claimant may have had in the matter.

Utilizing the information and materials provided by the claimant in support of the application, as well as other relevant materials reviewed, OWB attorneys prepare a recommendation to the Claims Review Staff as to whether the claimant meets the criteria for receiving an award, and if so, the recommended percentage of the award. Depending on the complexity of the award claim and the number of claimants who applied, this due diligence process may take a significant amount of time for OWB attorneys to conduct. While a less diligent process could result in quicker determinations for claimants, OWB strives to reach the soundest, not the quickest, result.

<sup>26</sup> 17 C.F.R. §§ 240.21F-10(a), (b).

<sup>27</sup> See Order Determining Whistleblower Award Claim, Exchange Act Release No. 77368 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 707 F. App'x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018).

Most award claim recommendations also generally go through a multi-tiered, robust review process, including review and comment by Enforcement’s Office of Chief Counsel and the Commission’s Office of General Counsel.

#### ***Preliminary Determinations Issued***

The Claims Review Staff, designated by the Co-Directors of Enforcement, considers OWB’s recommendation on the award application in accordance with the criteria set forth in Dodd-Frank and the Whistleblower Rules. The Claims Review Staff currently is composed of five senior officers in Enforcement, including the Co-Directors of Enforcement. The Claims Review Staff then issues a Preliminary Determination setting forth its assessment of whether the claim should be approved or denied and, if approved, setting forth the proposed award percentage amount.<sup>28</sup>

The Whistleblower Rules outline a number of positive and negative factors that the Commission and Claims Review Staff may consider in assessing an individual’s award percentage.<sup>29</sup> Award percentages are based on the particular facts and circumstances of each case, and are not based on any predetermined mathematical formula.

Factors that may increase an award percentage include the significance of the information provided by the whistleblower, the level of assistance provided by the whistleblower, the law enforcement interests at stake, and whether the whistleblower reported the violation internally through his or her firm’s internal reporting channels or mechanisms.<sup>30</sup>

Factors that may decrease an award percentage include whether the whistleblower was culpable or involved in the underlying misconduct, interfered with internal compliance systems, or unreasonably delayed in reporting the violation to the Commission.

#### ***Possible Record and Reconsideration Requests***

A claimant may submit a written request within 30 calendar days of the date of the Preliminary Determination asking for a copy of the record that formed the basis of the Claims Review Staff’s decision as to the claim for award. As a precondition to receiving a copy of the record, OWB requires claimants and their counsel, if the claimant is represented, to execute a confidentiality agreement limiting the use of such materials to the claims review process.<sup>31</sup> In keeping with our statutory obligation of confidentiality, OWB carefully redacts each record to remove any information that could identify another whistleblower in the matter. A claimant also has 30 calendar days to request a meeting with OWB, which OWB may grant at its discretion.

Claimants may seek reconsideration of the Preliminary Determination by submitting a written response to OWB within 60 calendar days of the later of (i) the date of the Preliminary Determination, or (ii) if the record was requested, the date when OWB made the record available for a claimant’s review.<sup>32</sup> If a claim is denied and the claimant does not object within the time period prescribed under the Whistleblower Rules, then the Preliminary Determination of the Claims Review Staff becomes the Final Order of the Commission.

<sup>28</sup> 17 C.F.R. § 240.21F-10(d).

<sup>29</sup> *Id.* § 240.21F-6.

<sup>30</sup> *But see* the discussion of the *Digital Realty* decision on pages 18–19 of this report.

<sup>31</sup> *Id.* § 240.21F-12(b). Rule 21F-12(b) states, “The Office of the Whistleblower may also require you to sign a confidentiality agreement, as set forth in § 240.21F-(8)(b)(4) of this chapter, before providing [Preliminary Determination] materials.”

<sup>32</sup> 17 C.F.R. § 240.21F-10(e).

“Award percentages are based on the particular facts and circumstances of each case, and are not based on any predetermined mathematical formula.”

Requests for reconsideration should include new information or argument and not simply restate what was included in the original award claim application. OWB attorneys may spend a considerable amount of time evaluating requests for reconsideration. OWB attorneys analyze claimants' legal arguments and take other steps before recommending a Proposed Final Determination for the Claims Review Staff to submit to the Commission. Because of the amount of time it takes to process reconsideration requests, OWB encourages claimants and their counsel to consider the merits of their reconsideration request in a particular matter and not to ask for reconsideration as a matter of course.

### ***Final Order Issued and Resolution of Appeals***

After considering any requests for reconsideration, the Claims Review Staff makes a Proposed Final Determination, and the matter is submitted to the Commission for its decision.<sup>33</sup>

All Preliminary Determinations of the Claims Review Staff that involve granting an award are submitted to the Commission for consideration as Proposed Final Determinations irrespective of whether the claimant objected to the Preliminary Determination.<sup>34</sup>

Within 30 days of receiving the Proposed Final Determination, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination becomes the Final Order of the Commission. Claimants who are issued a denial have a right to appeal the Commission's Final Order within 30 days of issuance to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the claimant resides or has his or her principal place of business.<sup>35</sup>

Final Orders of the Commission are publicly-available on the Commission's website and OWB's webpage. The public Final Orders are redacted to protect award claimants' confidentiality.

There are a number of factors that may affect the length of time it takes for OWB to review an award claim and for the Commission to issue a Final Order. For example, the number of claimants, both meritorious and non-meritorious, applying for an award in connection with a Covered Action affects the time it takes to process a claim. Similarly, the presence of novel issues, or the need to supplement the record with additional information from the claimant, may also lengthen the time it takes to process a claim. There may be a delay when there is a claim for an award in connection with a related action, requiring OWB to coordinate with or receive assistance from another regulator to understand what contribution the whistleblower may have made in the related action. Additionally, requests for the record and for reconsideration can substantially delay the issuance of a Final Order. We anticipate increased efficiencies in the claims review process if certain proposed rule amendments are adopted by the Commission.

For more information about the proposed rule amendments, please see pages 26–28 of this report.

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<sup>33</sup> *Id.* §§ 240.21F-10(g)-(h).

<sup>34</sup> *Id.* §§ 240.21F-10(f), (h).

<sup>35</sup> *Id.* § 240.21F-10(h). A whistleblower's rights of appeal from a Commission Final Order are set forth in Section 21F(f) of the Exchange Act, 15 U.S.C. § 78u-6(f), and Exchange Act Rule 21F-13(a), 17 C.F.R. § 240.21F-13(a).

## PROFILES OF AWARD RECIPIENTS

“Since program inception, the Commission has issued awards of over \$326 million to 59 individuals in connection with 48 Covered Actions, as well as in connection with several related actions.”

Protecting whistleblower confidentiality is an integral component of the whistleblower program. Dodd-Frank prohibits the Commission and its staff from disclosing any information that reasonably could be expected to reveal the identity of a whistleblower, subject to certain exceptions. Consequently, information that may tend to reveal a whistleblower’s identity is redacted from Commission orders granting or denying awards before they are issued publicly. This may include redacting the name of the enforcement action upon which the award is based.

Consistent with our statutory obligation to maintain whistleblower confidentiality but in an effort to provide more transparency, this section provides information about the profiles of past award recipients—from the whistleblower program’s inception to the end of FY 2018—while still protecting the identity of any particular individual.

Since program inception, the Commission has issued awards of over \$326 million to 59 individuals in connection with 48 Covered Actions, as well as in connection with several related actions. Many of the tips or complaints that were submitted by these successful whistleblowers share similar characteristics. The information provided by each award recipient was specific. For example, the whistleblowers identified particular individuals involved in the misconduct, or provided specific documents that substantiated their allegations or explained where such documents could be located. In some instances, the whistleblowers identified specific financial transactions that evidenced fraud, or provided detailed assessment of the wrongdoing. The misconduct reported by award recipients is often relatively current or ongoing at the time it was reported to the Commission. Additionally, nearly all of the award recipients provided Commission staff with additional assistance and/or information (*e.g.*, answered staff questions or provided testimony) after they submitted their initial tips.

An individual may be eligible to receive an award where her or his information leads to a successful enforcement action—meaning generally that the original information either caused the staff to open an examination or investigation, or the original information significantly contributed to a successful enforcement action where the matter was already under examination or investigation. Of the whistleblowers who have received awards under the program, approximately 67% provided original information that caused staff to open an investigation or examination, and approximately 33% received awards because their original information assisted with an already-existing investigation or examination. In assessing whether information assisted with an ongoing matter, the Commission considers factors such as whether the information allowed the Commission to bring an action in significantly less time or with fewer resources, and whether it supported additional successful charges, or successful claims against additional individuals or entities.<sup>36</sup> When the Commission has found claimants to be ineligible for awards on non-procedural grounds, it is often because the claimants’ information did not result in the opening of an investigation or examination, opening of a new line of inquiry in an existing investigation or examination, nor significantly contribute to an ongoing investigation or examination.

<sup>36</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,325 (June 13, 2011).

There is no requirement under the Whistleblower Rules that an individual be an employee or company insider to be eligible for an award. However, approximately 69% of the award recipients to date were current or former insiders of the entity about which they reported information of wrongdoing to the SEC. Of the award recipients who were current or former employees of a subject entity, approximately 83% raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.

Award recipients have also included investors who had been victims of the fraud, professionals working in the same or related industry, or other types of outsiders, such as individuals who had a personal relationship with the wrongdoer or individuals who have a special expertise in the market.

Whistleblowers have helped the Commission bring cases against a variety of individuals and entities, many of which are involved in the financial services industry. Individuals comprised approximately 44% of the defendants and respondents in cases resulting in whistleblower awards. Approximately 34% of the defendants and respondents in cases in which a whistleblower received an award concerned entities registered with the Commission, including broker-dealers, investment advisers, or other registered market participants. Unregistered entities comprised approximately 22% of the defendants and respondents.

In addition, whistleblowers have assisted the Commission in bringing enforcement cases involving an array of securities violations. A number of the award recipients reported information to the Commission concerning offering frauds, such as Ponzi, or Ponzi-like, schemes. Other award recipients provided tips to the Commission relating to false or misleading statements in a company's offering memoranda or marketing materials, false pricing information, accounting violations, internal controls violations, and FCPA violations, among other types of misconduct.

Under the Whistleblower Rules, individuals are permitted to jointly submit a tip to the Commission. Seven of the matters for which whistleblower awards were ordered involved two or more whistleblowers jointly submitting information to the Commission.

Individuals who provide information that leads to successful SEC actions resulting in monetary sanctions over \$1 million also may be eligible to receive an award if the same information led to a related action, such as a parallel criminal prosecution. Six of the award recipients to date have received payments based, in part, on collections made in related criminal or other qualifying related actions.

Past whistleblower award recipients hail from several different parts of the United States, and twelve recipients were foreign nationals or residents of foreign countries at the time they submitted their tips to the Commission.

“... whistleblowers have assisted the Commission in bringing enforcement cases involving an array of securities violations.”

## **PRESERVING INDIVIDUALS' RIGHTS TO REPORT TO THE COMMISSION AND SHIELDING EMPLOYEES FROM RETALIATION**

Section 21F(h)(1) of Dodd-Frank expanded protections for whistleblowers and broadened prohibitions against retaliation.<sup>37</sup> Following the passage of Dodd-Frank, the Commission implemented rules that enabled the SEC to take legal action against employers who have retaliated against whistleblowers. To date, the Commission has brought three anti-retaliation enforcement actions.

Exchange Act Rule 21F-17(a) prohibits any person from taking any action to prevent an individual from contacting the SEC directly to report a possible securities law violation. The Rule states that “[n]o person may take any action 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 . . . with respect to such communications.”<sup>38</sup> To date, the Commission has brought nine enforcement actions involving violations of Rule 21F-17.

FY 2018 saw a major shift with respect to the scope of the Dodd-Frank anti-retaliation protections. Under the Commission’s Whistleblower Rules, the anti-retaliation protections applied to employees who reported possible securities law violations, whether internally, to other law enforcement agencies, or to the SEC. Recognizing the important role that internal compliance programs play in helping the Commission prevent, detect, and stop securities law violations, there are multiple provisions in the Whistleblower Rules meant to support individuals who choose to report internally in the first instance, including a potential increase in award percentage.

The federal courts of appeals, however, were divided over whether the Dodd-Frank anti-retaliation protections applied to employees who report potential violations of the securities laws internally without also reporting to the Commission. The United States Supreme Court granted certiorari in *Digital Realty* to address the scope of the Dodd-Frank anti-retaliation protections.

In February 2018, the Court in *Digital Realty* held that the whistleblower provisions of the Exchange Act require that an employee report a possible securities law violation to the Commission to qualify for protection against employment retaliation under Section 21F. The Court thus invalidated the Commission’s rule interpreting Section 21F’s anti-retaliation protections to apply in cases where an employee had reported only internally. In the months following the *Digital Realty* decision, there was an increase in the number of whistleblower tips received by the Commission, which may have been attributable, in part, to the decision.

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<sup>37</sup> 15 U.S.C. § 78u-6(h)(1).

<sup>38</sup> 17 C.F.R. § 240.21F-17(a).

Following the *Digital Realty* decision, the Commission issued proposed rule amendments to Rule 21F-2. The proposed rule would modify Rule 21F-2 so that it comports with the Court's holding by, among other things, establishing a uniform definition of "whistleblower" that would apply to all aspects of Exchange Act Section 21F.

Retaliation protection remains a key tenet of the whistleblower program, and OWB will continue to support enforcement investigations where retaliation occurred after the whistleblower reported securities violations to the Commission. Furthermore, OWB will continue to support the enforcement of the whistleblower protections of Exchange Act Rule 21F-17(a), which prohibits any person from taking any action to prevent an individual from contacting the SEC directly to report a possible securities law violation. OWB will continue to work closely with investigative staff to identify and investigate practices in the use of confidentiality and other kinds of agreements, or engagement in other practices, to interfere with individuals' ability to report potential wrongdoing to the SEC.

“OWB will continue to support enforcement investigations where retaliation occurred [and] . . . will continue to support the enforcement of the whistleblower protections of Exchange Act Rule 21F-17(a) . . . ”



## WHISTLEBLOWER TIPS RECEIVED

“From FY 2012 . . . to FY 2018, the number of whistleblower tips received by the Commission has grown by approximately seventy-six percent.”

The Whistleblower Rules specify that individuals who would like to be part of the whistleblower program must submit their tip via the Commission’s online portal or by mailing or faxing their tip on Form TCR to OWB.<sup>39</sup> Whistleblowers who use the online portal to submit a tip receive a computer-generated confirmation of receipt with a TCR submission number. For those who submit a hard-copy Form TCR by mail or fax, OWB sends an acknowledgement letter, which includes a TCR submission number, or a deficiency letter explaining that the information was not properly submitted under the Whistleblower Rules. All whistleblower tips referring to potential securities law violations received by the Commission are entered into the TCR System and are evaluated by the Commission’s Office of Market Intelligence (OMI) within Enforcement. The Commission’s TCR System was recently updated to include more user-friendly features, including the ability to upload much larger attachments. OWB encourages individuals and their counsel to submit tips using the Commission’s online portal, rather than through a hard-copy Form TCR. Furthermore, claimants and their counsel are encouraged to submit their tip via only one method. For example, the same tip should not be entered through the online portal and then mailed in hard copy to the office. This can create duplication of work for OWB intake staff.

### Increase in Whistleblower Tips

Throughout the history of the whistleblower program, the Commission’s receipt of whistleblower tips has reflected an upward trajectory, and the number of tips received this past fiscal year proves to be no exception to this trend. Since August 2011, the Commission has received over 28,000 whistleblower tips, and in FY 2018 alone, received more than 5,200 tips. The table below shows the number of whistleblower tips received by the Commission on a yearly basis since the inception of the whistleblower program.<sup>40</sup>

FY2011	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018
334	3,001	3,238	3,620	3,923	4,218	4,484	5,282

As reflected in this table, from FY 2012, the first year for which we have full-year data,<sup>41</sup> to FY 2018, the number of whistleblower tips received by the Commission has grown by approximately seventy-six percent.<sup>42</sup>

<sup>39</sup> 17 C.F.R. § 240.21F-9(a).

<sup>40</sup> The Commission also receives tips from individuals who do not wish to be part of the whistleblower program. The data in this report is limited to whistleblower tips and does not reflect all tips or complaints received by the Commission during the fiscal year.

<sup>41</sup> Because the Whistleblower Rules became effective on August 12, 2011, only seven weeks of whistleblower data is available for FY 2011.

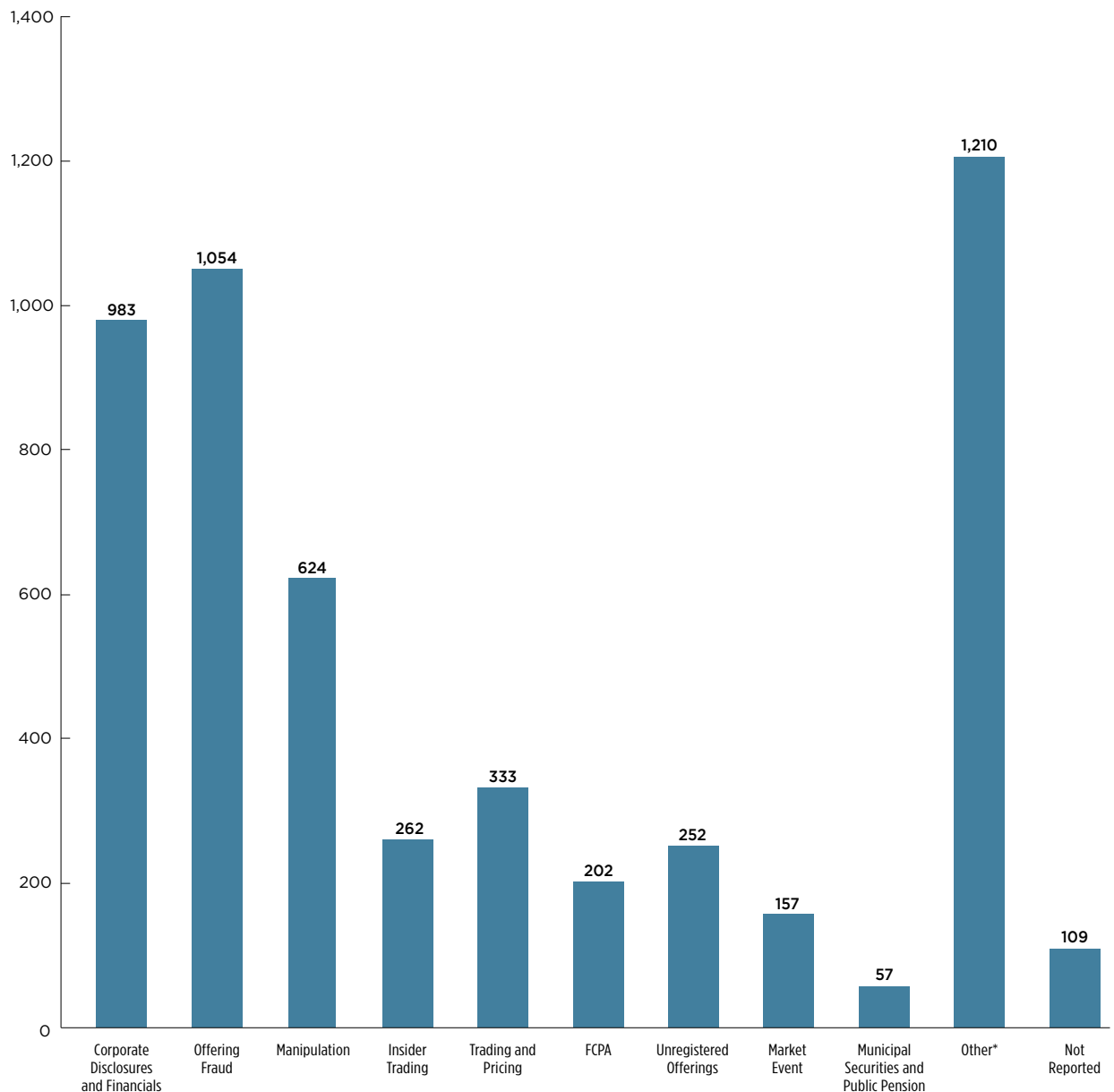
<sup>42</sup> In FY 2016 and FY 2017, the Commission received an unusually high number of whistleblower tips from two individuals, and received an unusually high number of whistleblower tips from one individual in FY 2018. The data for these fiscal years excludes tips received from these individuals—both in this section of the report and in the appendices to this report.



### Whistleblower Allegation Type

Whether submitting tips on Form TCR or through the online portal, whistleblowers should identify the nature of their complaint allegations. In FY 2018, the most common complaint categories reported by whistleblowers were Offering Fraud (20%), Corporate Disclosures and Financials (19%), and Manipulation (12%).<sup>43</sup>

The following graph reflects the number of whistleblower tips received in FY 2018 by allegation type.<sup>44</sup>



<sup>43</sup> This breakdown reflects the categories selected by whistleblowers and, thus, the data represents the whistleblower's own characterization of the violation type.

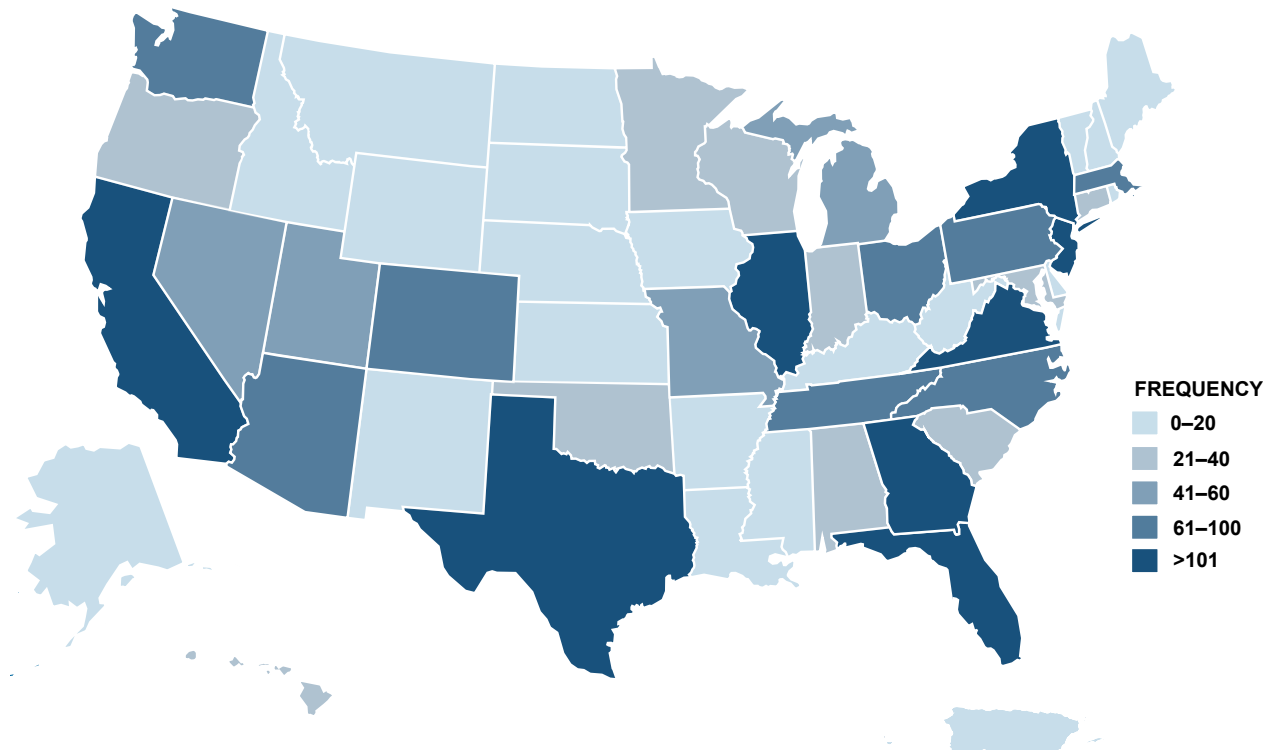
<sup>44</sup> The category of "Other" indicates that the submitter identified the whistleblower TCR as not fitting into any allegation category that is listed on the questionnaire.

The types of securities violations reported by whistleblowers have remained generally consistent over the last seven years. Since the beginning of the program, Corporate Disclosures and Financials, Offering Fraud, and Manipulation have consistently ranked as the three highest allegation types reported by whistleblowers. Appendix A to this report provides a comparison among the number of whistleblower tips by allegation type that the Commission received during FY 2015 through FY 2018. In addition, in this past fiscal year, 39 tips were submitted as involving “Initial Coin Offerings and Cryptocurrencies,” an allegation category added to the TCR System in the fourth quarter of FY 2018. The addition of this allegation category reflects a desire to refine data capture to better understand misconduct in the developing digital asset arena.

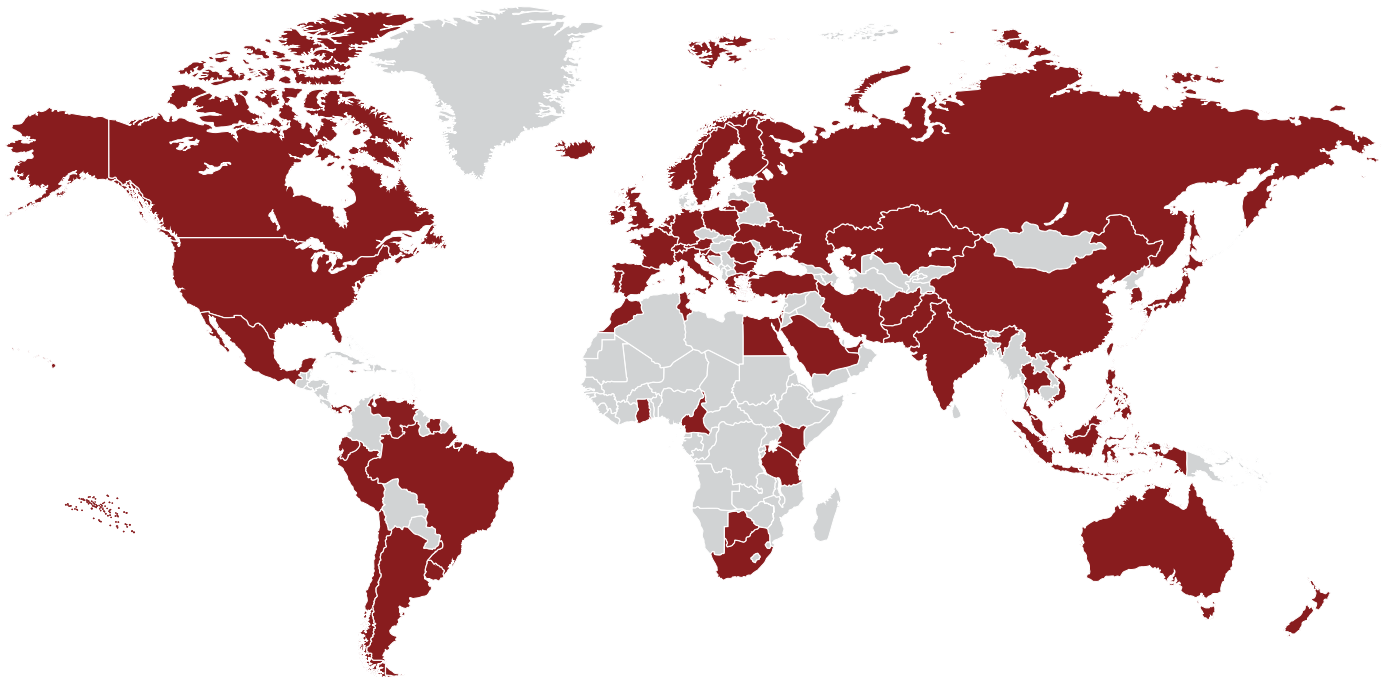
### Geographic Origin of Whistleblower Tips

Through OWB’s extensive outreach efforts to publicize and promote the Commission’s whistleblower program, the Commission continues to receive whistleblower submissions from individuals throughout the United States, as well as internationally.

During FY 2018, California, New York, Florida, Texas and New Jersey yielded the highest number of whistleblower tips.



Since the beginning of the whistleblower program, the Commission has received whistleblower tips from individuals in 119 countries outside the United States. In FY 2018 alone, the Commission received whistleblower submissions from individuals in 72 foreign countries. After the United States, OWB received the highest number of whistleblower tips this past fiscal year from individuals in Canada, the United Kingdom, and Australia. The map below reflects the countries in which whistleblower tips originated during FY 2018.



Appendices B and C to this report provide detailed information concerning the sources of domestic and foreign whistleblower tips that the Commission received during FY 2018.

## PROCESSING OF WHISTLEBLOWER TIPS

OMI evaluates incoming whistleblower TCRs and assigns specific, credible, and timely TCRs to members of the Commission staff for further analysis or investigation.

### TCR Evaluation

OMI reviews every TCR submitted by a whistleblower to the Commission that references a possible securities law violation. OMI examines each tip to identify those with high-quality information that warrant the additional allocation of Commission resources. Generally, when the evaluation of a tip could benefit from the specific expertise of another Division or Office within the SEC, the tip is forwarded to staff in that Division or Office for further analysis. When OMI determines that a tip should be considered for investigation, OMI assigns the tip to one of the Commission's eleven regional offices, a specialty unit, or to an Enforcement group in the Home Office. Tips that relate to an existing investigation are forwarded to the staff working on the matter.

The Commission may use information from whistleblower tips in several different ways. For example, the Commission may initiate an enforcement investigation based on the whistleblower's tip. Even if the tip does not cause an investigation to be opened, it may still help lead to a successful enforcement action if the whistleblower provides additional information that significantly contributes to an ongoing or already-existing investigation. Tips may also prompt the Commission to commence an examination of a regulated entity, which may lead to an enforcement action or to the entity correcting the problem or clarifying an issue.

OWB tracks whistleblower tips that are referred to Enforcement staff for investigation. OWB currently is tracking over 900 matters in which a whistleblower's tip has caused a Matter Under Inquiry or investigation to open, or has been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation. Not all of these matters, however, will result in an enforcement action, or an enforcement action where the required threshold of over \$1 million in monetary sanctions will be ordered. Whistleblower tips may also be used to open an examination or referred to examination staff in connection with a planned or ongoing exam.

In general, whistleblower tips that are specific, credible, and timely, and which are accompanied by corroborating documentary evidence, are more likely to be forwarded to investigative staff for further analysis or investigation. For instance, if the tip identifies individuals involved in the scheme, provides examples of particular fraudulent transactions, or points to non-public materials evidencing the fraud, the tip is more likely to be assigned to Enforcement staff for investigation. Tips that make blanket assertions or general inferences based on market events are less likely to be forwarded to or investigated by Enforcement staff.

“... whistleblower tips that are specific, credible, and timely, and which are accompanied by corroborating documentary evidence, are more likely to be forwarded to investigative staff for further analysis or investigation.”

In certain instances, OMI or other Enforcement staff may determine it is more appropriate that a whistleblower's tip be investigated by another regulatory or law enforcement agency. When this occurs, the tip is referred to the other agency in accordance with the Exchange Act's whistleblower confidentiality requirements.

Tips that relate to the financial affairs of an individual investor or a discrete investor group usually are forwarded to the Commission's Office of Investor Education and Advocacy (OIEA) for resolution. Comments or questions about agency practice or the federal securities laws also are forwarded to OIEA.

### **Assistance by OWB**

OWB supports the tip allocation and investigative processes in several ways. When whistleblowers submit tips on a Form TCR in hard-copy by mail or fax, OWB enters the information into the TCR System so it can be evaluated by OMI. Tips submitted by whistleblowers through the Commission's online portal are automatically forwarded to OMI for evaluation. During the evaluation process, OWB may assist by contacting the whistleblower to obtain additional information to help in the triage process.

After submitting an initial tip, a whistleblower is free to, and often does, submit additional information or materials to buttress his or her earlier allegations. Additional information may be submitted through the online portal, with reference to the original TCR submission number (if known), or may be submitted directly to the investigative staff if the whistleblower is working with staff on the matter. To the extent additional information is sent to OWB in hard-copy by mail or fax, OWB then uploads the additional information to the TCR System. While OWB sends acknowledgement letters confirming receipt of Form TCRs or deficiency letters where appropriate, due to the increasing volume of additional information submitted in paper form to OWB, and the ready availability of electronic submissions, OWB does not provide acknowledgement letters in response to additional information.

## PROPOSED WHISTLEBLOWER RULE AMENDMENTS

“The proposed amendments are intended to increase efficiencies in the whistleblower claims review process...”

The proposed amendments to the Whistleblower Rules were published in the Federal Register on July 20, 2018. The public comment period ended on September 18, 2018.<sup>45</sup> The Commission received approximately 100 unique letters and two form letters from commenters. Commission staff is currently reviewing the comments.<sup>46</sup> The proposed amendments are intended to increase efficiencies in the whistleblower claims review process, provide the Commission with additional tools in making whistleblower awards to ensure that meritorious whistleblowers are appropriately rewarded for their efforts, and align the requirements for anti-retaliation protection under the Whistleblower Rules with the holding in *Digital Realty*. The proposed amendments would make certain modifications and clarifications to the existing rules, as well as several technical amendments.

### *Increased Efficiencies in Claims Review Process*

The proposed rule amendments are intended to increase efficiencies in the claims review process by clarifying the Commission’s ability to bar individuals from submitting whistleblower applications where they are found to have submitted false information to the Commission or where they repeatedly make frivolous award claims in Commission actions. The proposed rules would codify the Commission’s current practice with respect to barring applicants who submit false, fictitious, or fraudulent statements in their dealings with the Commission and permit the Commission to permanently bar any applicant from seeking an award after the Commission determines that the applicant has abused the process by submitting three award applications that the Commission finds to be frivolous or lacking a colorable connection between the tip (or tips) and the Commission action. The proposed rule would expressly provide, however, that OWB shall advise any claimant of the Office’s assessment that the claimant’s award application for a Commission action is frivolous or lacking a colorable connection between the tip and the action for which the individual has sought an award. If the applicant withdraws the application at that time, it would not be considered by the Commission in determining whether to exercise its authority to impose a bar for three or more frivolous applications or applications lacking a colorable connection between the tip and the Commission action for which the award was sought.

In addition, the proposed rule amendments would provide the Commission with a summary disposition procedure for certain types of likely denials, such as untimely award applications, applications that involve a tip that was not provided to the Commission in the form and manner that the rules require, and applications where the claimant’s information was never provided to or used by investigative staff. The proposed summary disposition procedure is intended to help facilitate a more timely resolution of such relatively straightforward denials, while freeing up staff resources to focus on processing potentially meritorious award claims.

<sup>45</sup> See Amendments to the Commission’s Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018).

<sup>46</sup> Comments to the proposed rules are available at: <https://www.sec.gov/comments/s7-16-18/s71618.htm>

### ***Additional Tools in Award Determinations***

The proposed rule amendments would provide the Commission with additional tools in making awards, including by: (i) allowing awards based on deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) entered into by the U.S. Department of Justice or a state attorney general in a criminal case, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws; (ii) providing additional considerations for small and exceedingly large awards; and (iii) eliminating potential double recovery under the current definition of “related action.”

Allowing awards based on NPAs, DPAs, and settlement agreements outside of the context of a judicial or administrative proceeding would help ensure that whistleblowers are not disadvantaged because of the particular form of an action that was pursued.

In the context of potential awards that could yield a payout of less than \$2 million to a whistleblower, the proposed rules would authorize the Commission in its discretion to adjust the award percentage upward under certain circumstances (subject to the 30% statutory maximum) to an amount up to \$2 million.

Under the proposed rules, if a potential award could yield total collected monetary sanctions of at least \$100 million, the Commission could exercise its discretion to adjust the award percentage so that it would yield a payout (subject to the 10% statutory minimum) that does not exceed an amount that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers. In no event, however, would the award be adjusted below \$30 million (or below the 10% statutory minimum). This proposed rule would apply to award applications that are connected to a NoCA posted on or after the effective date of the rules.

In addition, the proposed amendments would clarify that a law-enforcement or separate regulatory action would not qualify as a “related action” if the Commission determines that there is a separate whistleblower award scheme that more appropriately applies to the enforcement action.

### ***Uniform Definition of “Whistleblower”***

As discussed elsewhere in this report, the proposed amendments would modify Rule 21F-2 so that it comports with the Supreme Court’s holding in *Digital Realty*. The Court in *Digital Realty* held that the whistleblower provisions of the Exchange Act require that a person report a possible securities law violation to the Commission in order to qualify for protection against employment retaliation, thus invalidating the Commission’s rule interpreting Section 21F’s anti-retaliation protections to apply in cases of internal reports. The proposed amendments would, among other things, establish a uniform definition of “whistleblower” that would apply to all aspects of Exchange Act Section 21F—*i.e.*, the award program, the heightened confidentiality requirements, and the employment anti-retaliation protections. To qualify for anti-retaliation protection, the rule proposal notes that the individual must have submitted his or her information to the Commission “in writing.”

***Interpretive Guidance***

In addition to the proposed rule amendments, the Commission published proposed interpretive guidance to help clarify the meaning of “independent analysis” as that term is defined in Exchange Act Rule 21F-4(b)(3) and utilized in award applications. To be considered “analysis,” the Commission’s rule requires that a whistleblower’s examination and evaluation of publicly available information “reveal[] information that is not generally known or available to the public.”<sup>47</sup> Under the proposed guidance, in order to qualify as “independent analysis,” a whistleblower’s submission must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information.

The full text of the proposed rule amendments is available at:

<https://www.sec.gov/rules/proposed/2018/34-83557.pdf>

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<sup>47</sup> 17 CFR § 240.21F-4(b)(3).



## SECURITIES AND EXCHANGE COMMISSION INVESTOR PROTECTION FUND

Section 922 of Dodd-Frank established the Investor Protection Fund to provide funding for the Commission's whistleblower award program, including the payment of awards in related actions.<sup>48</sup> As required by statute, all payments are made out of this Fund, which is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards. The Fund also is used to finance the operations of the suggestion program of the SEC's Office of Inspector General.<sup>49</sup> The suggestion program is intended for the receipt of suggestions from SEC employees for improvements in work efficiency, effectiveness, productivity, and the use of resources at the Commission, as well as allegations by SEC employees of waste, abuse, misconduct, or mismanagement within the Commission, and is operated outside of OWB.<sup>50</sup>

Section 21F(g)(5) of the Exchange Act requires certain Fund information to be reported to Congress on an annual basis. Below is a chart containing Fund-related information for FY 2018.

	FY 2018
Balance of Fund at beginning of fiscal year <sup>51</sup>	\$ 297,387,453.49
Unavailable amounts from FY 2017 available during fiscal year <sup>52</sup>	\$ 310,478.00
Amounts deposited into or credited to Fund during fiscal year	\$ 179,626,352.60
Amount of interest receipts from investments during fiscal year	\$ 5,746,262.10
Amount of receipts during fiscal year that are unavailable <sup>52</sup>	\$ (12,234,592.57)
Amounts paid from Fund during fiscal year to whistleblowers	\$ (94,348,311.00)
Amounts estimated to be paid from Fund during fiscal year to whistleblowers	\$ (77,127,230.29)
Amount disbursed to Office of the Inspector General during fiscal year	\$ (26,430.51)
Balance of Fund at end of fiscal year	\$ 299,333,981.82

48 Section 21F(g)(2)(A) of the Exchange Act, 15 U.S.C. § 78u-6(g)(2)(A).

49 Section 21F(g)(2)(B) of the Exchange Act, 15 U.S.C. § 78u-6(g)(2)(B), provides that the Fund shall be available to the Commission for "funding the activities of the Inspector General of the Commission under section 4(i)." The Commission's Office of General Counsel has interpreted this section to refer to Exchange Act Section 4D, which established the Inspector General's suggestion program. That section provides that the "activities of the Inspector General under this subsection shall be funded by the Securities and Exchange Commission Investor Protection Fund established under Section 21F." *Id.* § 78d-4(e).

50 Section 4D(a) of the Exchange Act, *id.* § 78d-4(a).

51 During FY 2018, the SEC changed how the balance of the Fund is defined for replenishment purposes. Prior to FY 2018, the balance was defined as total assets of the Fund. Beginning in FY 2018, the SEC changed to the available unobligated balance. As a result, the beginning balance differs from what was previously reported as the ending balance for FY 2017.

52 Amounts relate to available resources temporarily reduced during the fiscal year as a result of the Budget Control Act of 2011. These amounts become available at the beginning of the following fiscal year.

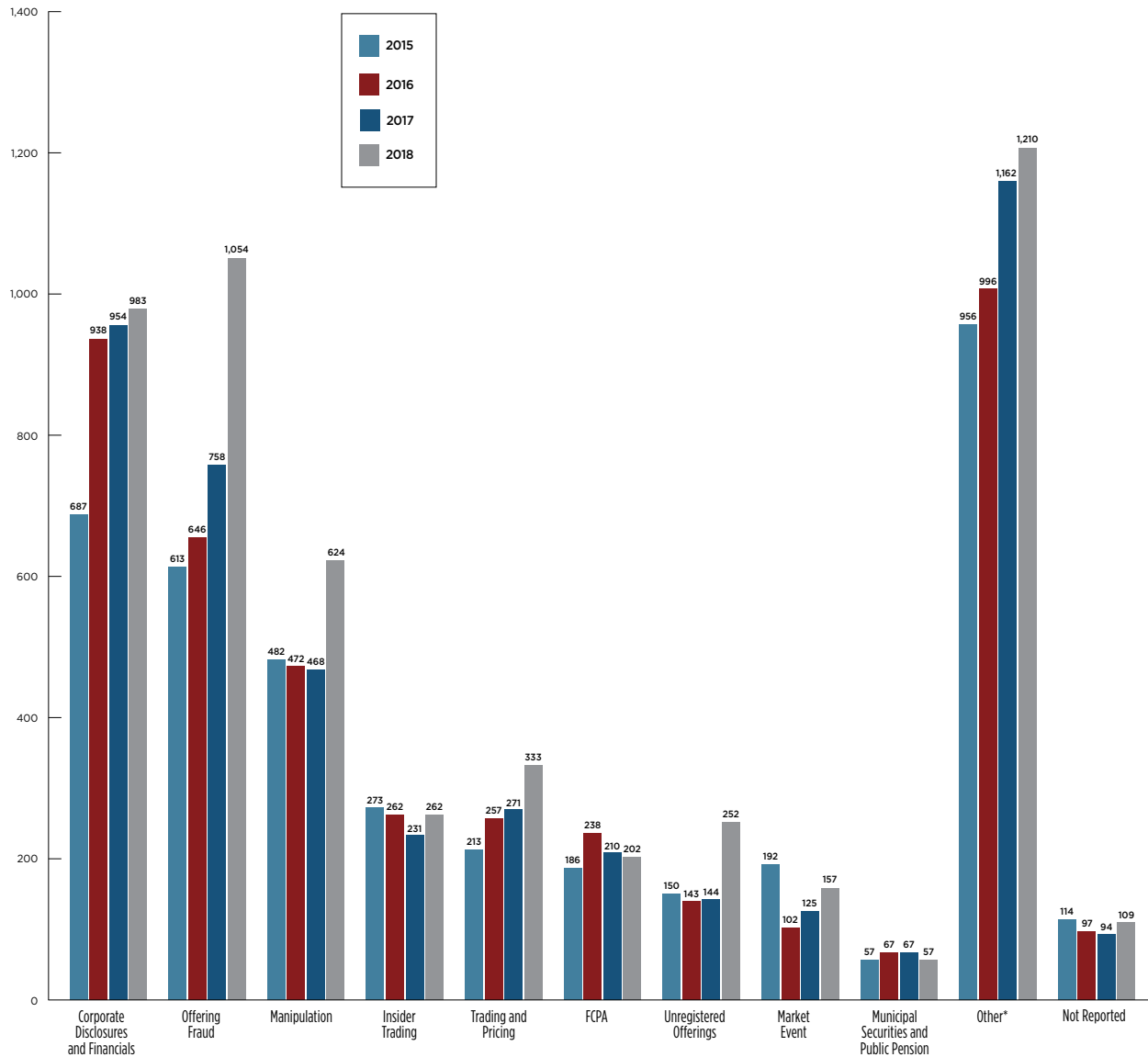
Whenever the balance of the Fund falls below \$300 million, a statutory replenishment mechanism is triggered. For a complete description of the mechanisms that Congress established to replenish the Fund, see Section 21F(g)(3) of the Exchange Act, 15 U.S.C. 78-6(g)(3).

Section 21F(g)(5) of the Exchange Act also requires a complete set of audited financial statements for the Fund, including a balance sheet, income sheet, income statement, and cash-flow analysis. That information will be included in the Commission's Agency Financial Report, which will be separately submitted to Congress.



## APPENDIX A

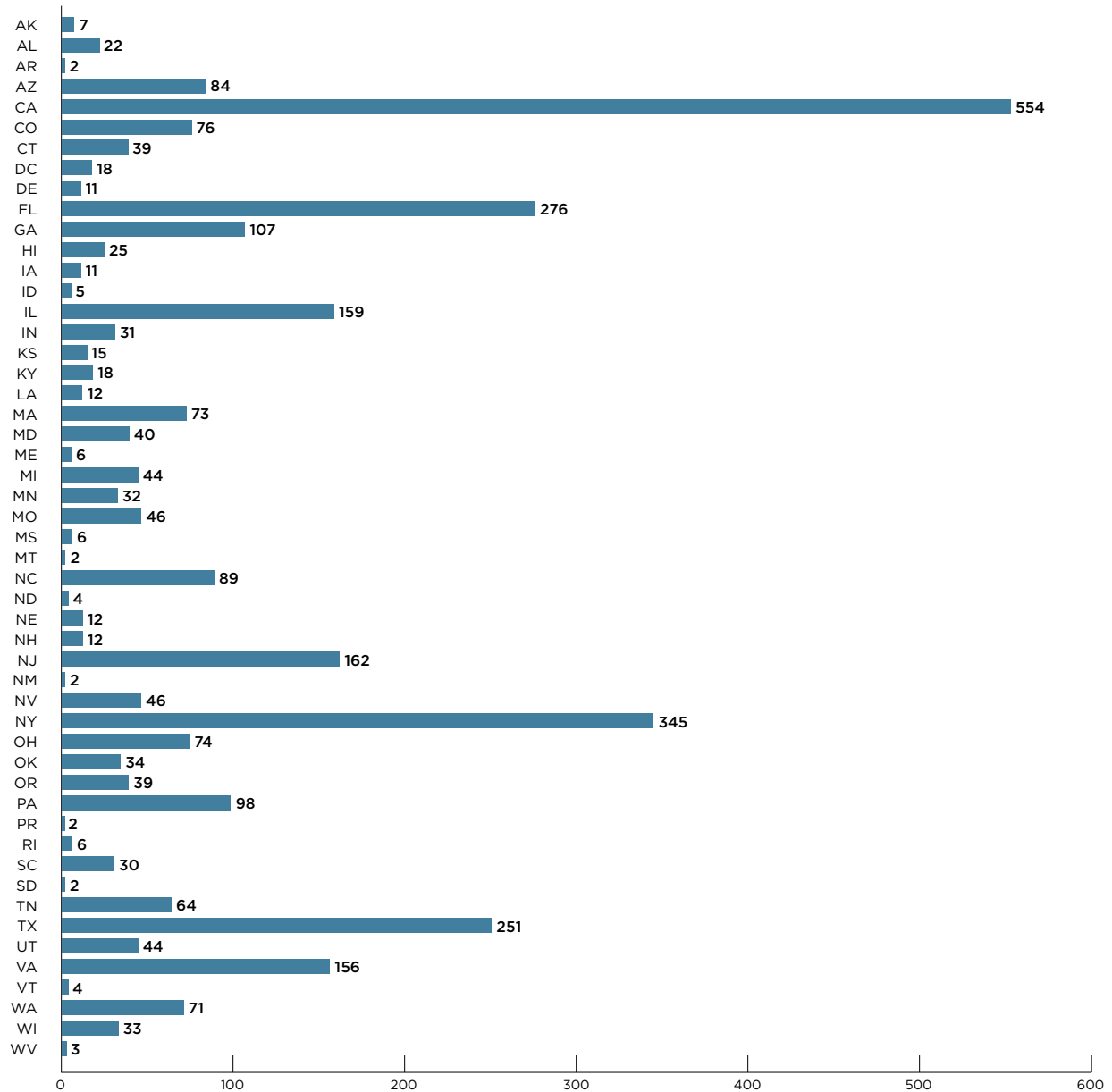
### WHISTLEBLOWER TIPS BY ALLEGATION TYPE COMPARISON OF FISCAL YEARS 2015-2018



\*The category of "Other" indicates that the submitter identified the whistleblower TCR as not fitting into any allegation category that is listed on the questionnaire. Also, in the interest of space, this chart does not reflect 39 tips submitted under "Initial Coin Offerings and Cryptocurrencies," an allegation category introduced during the fourth quarter of FY 2018.

## APPENDIX B

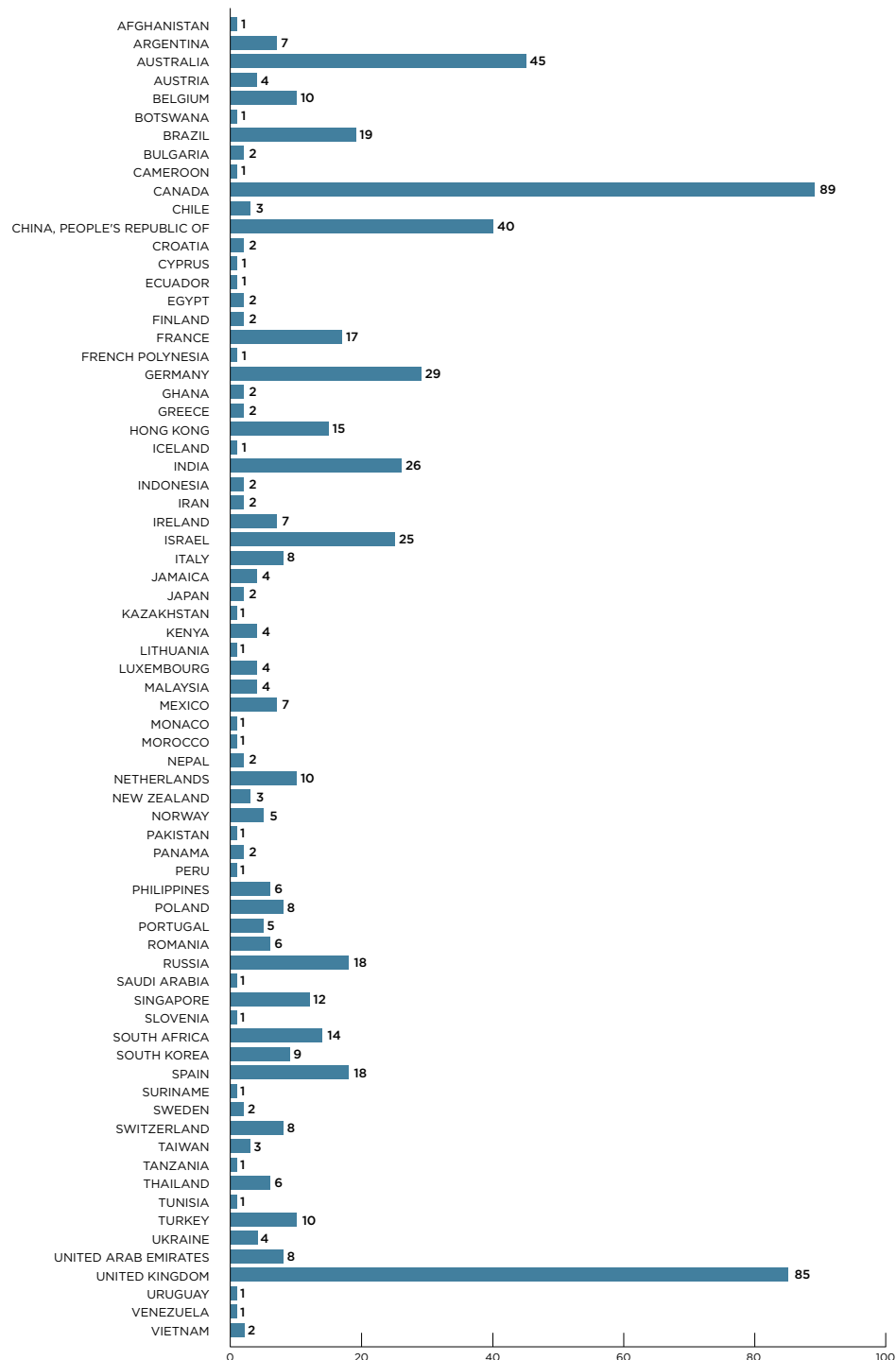
### WHISTLEBLOWER TIPS RECEIVED BY GEOGRAPHIC LOCATION UNITED STATES AND ITS TERRITORIES, FISCAL YEAR 2018\*



\*Multiple individuals may jointly submit a TCR under the Commission's whistleblower program. Appendix B reflects the number of individuals submitting WB TCRs to the Commission within the United States, or one of its territories, and not the total number of domestic WB TCRs received by the Commission during FY 2018. For example, a WB TCR that is jointly submitted by two individuals—one in New York and one in New Jersey—would be reflected in Appendix B as a submission from both New York and New Jersey. The total number of individuals submitting WB TCRs in the United States or a U.S. territory during FY 2018 exceeded 3,300 and constituted about 62% of the individuals participating in the Commission's whistleblower program for this period. Additionally, over 1,350 individuals, constituting approximately 26% of the total number of persons participating in the Commission's whistleblower program in FY 2018, submitted WB TCRs without any foreign or domestic geographical categorization or submitted them anonymously through counsel.

## APPENDIX C

### WHISTLEBLOWER TIPS RECEIVED BY GEOGRAPHIC LOCATION INTERNATIONAL, FISCAL YEAR 2018\*



\*As with domestic WB TCRs, multiple individuals from abroad may jointly submit a TCR under the Commission's whistleblower program. Appendix C reflects the number of individuals submitting WB TCRs to the Commission from abroad, and not the total number of foreign WB TCRs received during FY 2018. The number of individuals submitting WB TCRs from abroad during FY 2018 exceeded 650, and constituted approximately 12% of the individuals participating in the Commission's whistleblower program.



OFFICE OF THE WHISTLEBLOWER

*Washington, DC*