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Whistleblower Retaliation Claims: 2020 Review and What to Expect for 2021

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January 25, 2021

2020 Annual SEC Whistleblower Program Report: The Numbers

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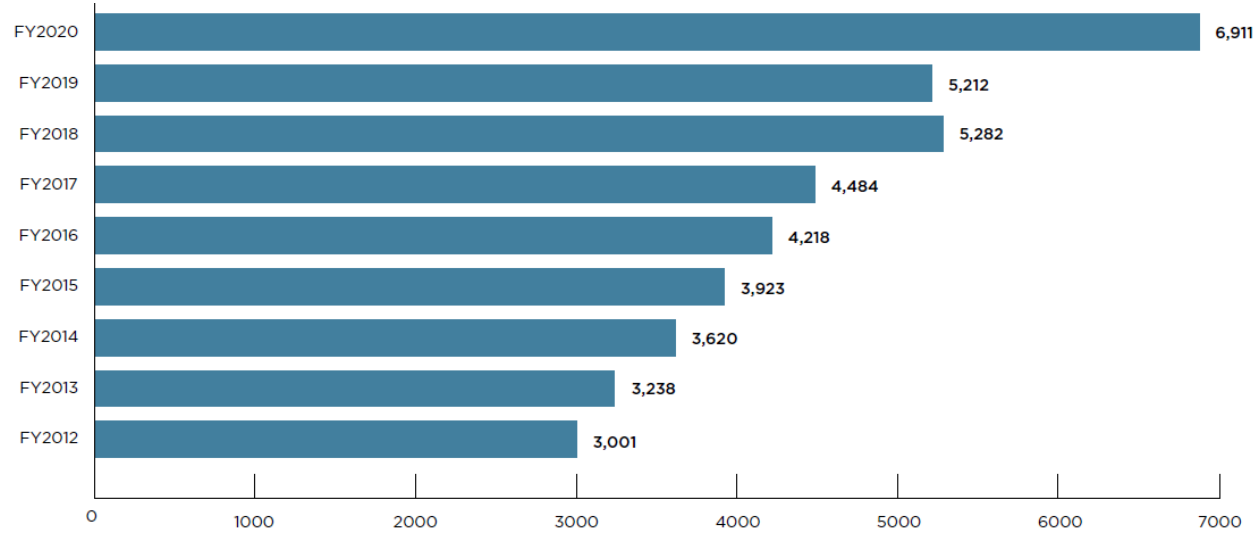
2020 Annual SEC Whistleblower Program Report: Record-Breaking Number of Tips Received

- The SEC received a record-breaking number of over 6,900 whistleblower tips—a 31% increase from FY 2018, the second highest tip year, and a 130% increase since the beginning of the program.



2020 Annual SEC Whistleblower Program Report: The Numbers

- Whistleblowers are asked to identify the nature of their complaint allegations.
- In 2020, the most common complaint categories were:
  - Corporate disclosures and financials (1,710 tips)
  - Offering fraud (1,078 tips)
  - Manipulation (942 tips)
  - Insider trading (369 tips)
  - Initial coin offerings and cryptocurrencies (345 tips)
- Since the beginning of the program, corporate disclosures and financials, offering fraud, and manipulation have consistently ranked among the top three allegation categories.

2020 Annual SEC Whistleblower Program Report: Maturation of the Program

- Since issuing its first award in 2012 through the end of FY 2020, the SEC has awarded approximately $562 million to 106 individuals (approximately $736 million to 128 individuals by the end of 2020).
- SEC enforcement actions from whistleblower tips have resulted in over $2.5 billion in ordered financial remedies, including more than $1.4 billion in disgorgement.
- Streamlining: The SEC's Office of the Whistleblower processed 315 claims to Preliminary Determination, a 167% increase from FY 2019, and the Commission issued Final Orders for 197 individual award claims in FY 2020, a 140% increase from FY 2019.

2020 Annual SEC Whistleblower Program Report: Maturation of the Program

- The pace and size of SEC whistleblower awards have increased dramatically in the last three years, as the program has matured.
- In FY 2020, the SEC ordered whistleblower awards of approximately $175 million to 39 individuals, triple the number of individuals awarded in 2018, the next highest fiscal year.
- The awards made in FY 2020 represent 31% of the total dollars awarded to all whistleblowers and 37% of the individual award recipients since the beginning of the program.
- On October 22, 2020 (FY 2021), the SEC issued a whistleblower award of over $114 million, which is the largest award in the program's history.

Whistleblower Award Program Incentives: An Overview

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Whistleblower Award Program Incentives: An Overview

- Those providing "original information" leading to sanctions of more than $1 million will receive an award of 10%-30% of the penalty imposed.
- Qualifications for an award under the Whistleblower Rules.
- Reporting can be direct, anonymous, or through counsel, and reporters can benefit even if they participated in underlying conduct—so long as they are not convicted of a crime.

Whistleblower Award Program Incentives: An Overview

Individuals whose principal duties involve compliance or internal audit responsibilities—such as officers, directors, trustees, and partners who learn about misconduct through another employee's reporting—are generally excluded from award eligibility unless one of three exceptions applies:

- If an individual is engaged in conduct that interferes with an SEC investigation;
- If an individual is aware that the company is engaged in, or intends to engage in, conduct that will cause significant, long-term damages to the company or its shareholders (i.e., the exception intends to prevent a $10 million problem from becoming a $100 million problem); or
- If misconduct is reported internally and, after 120 days, an individual officer, director, or compliance professional believes that nothing has been done to correct the misconduct, that person can report the alleged violation to the SEC.

Recent Developments in SEC Whistleblower Practice

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Whistleblower Rule Amendments

On September 23, 2020, a series of amendments to the Whistleblower Rules designed to provide greater clarity to whistleblowers and increase the program's efficiency and transparency were approved. The amendments became effective on December 7, 2020.

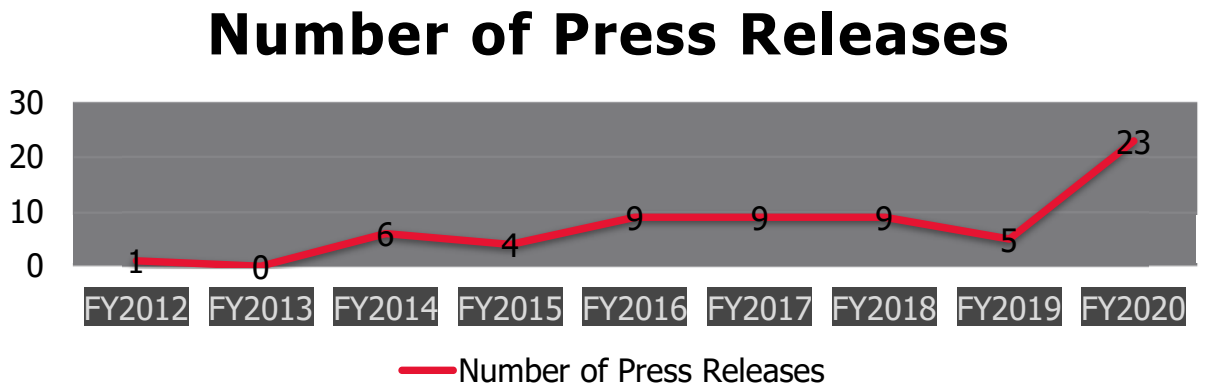
- Presumption of the statutory maximum award amount for certain awards of $5 million and less.
- Allowing awards where relief is a deferred prosecution agreement or non-prosecution agreement entered into by the DOJ, or a settlement agreement entered into by the SEC outside of the context of a judicial or administrative proceeding.
- Clarifying the current definition of "related action".
- Uniform definition of "Whistleblower" in response to the Supreme Court's decision in *Digital Realty.*

Whistleblower Rule Amendments

- Amendments designed to help increase the SEC's efficiency in processing whistleblower award applications
- Amendments that clarify and enhance certain policies, practices, and procedures in implementing the program
- Commission interpretive guidance that helps clarify the meaning of "independent analysis" as defined in Exchange Act Rule 21F-4 and utilized in award applications

SEC Whistleblower Awards – Press Releases

- In FY 2020, the SEC issued 23 press releases on whistleblower awards.



- SEC officials indicated that the surge of whistleblower tips received gained traction in March 2020 when COVID-19 forced millions to work remotely away from their offices.

Expansion of the Exception Rule

- On December 14, 2020, the SEC announced an award of more than $300,000 to a whistleblower with audit responsibilities. This is the fourth time the SEC has paid a whistleblower with internal audit or compliance related responsibilities.
- Although individuals with audit or compliance responsibilities are generally not eligible for awards, a whistleblower who reasonably believes that an entity is engaging in conduct that would impede the investigation falls within one of the exceptions to that rule.
  - Here the SEC stated that the Whistleblower had a reasonable basis to believe that the entity would impede the Commission's investigation.
- Chief of the SEC's Office of the Whistleblower commented that the award "is an example of the important role that audit and compliance professionals can play in assisting the Commission's enforcement efforts, especially when the entity is attempting to thwart an investigation . . . the whistleblower attempted to remedy the conduct and provided exceptional assistance to the enforcement staff."

What to Expect from the Biden Administration

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Recent Developments in Whistleblower Employment Law

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Recent Developments: How COVID-19 Affected Whistleblower Retaliation Claims

- OSHA has been deluged by thousands of whistleblower complaints related to alleged health and safety violations during the COVID-19 pandemic.
- DOL's Office of Inspector General audited OSHA's response to the complaints and found that "the pandemic has significantly increased the number of whistleblower complaints OSHA has received" and the agency needed to improve its handling of whistleblower complaints during the pandemic.
- Rise in litigation in federal and state courts brought by employees alleging they were retaliated against for reporting concerns related to COVID-19.
  - The claims have been brought under a variety of whistleblower protection laws, including state and local laws.

Recent Developments: How COVID-19 Affected Whistleblower Retaliation Claims

A federal bill (H.R. 7227) was introduced in Congress but has not moved after June 2020. Here are the main items of the bill:

"A protected individual may not be discharged, demoted, blacklisted, prejudiced by any action or lack of action, or otherwise discriminated against in any way (including in the hiring process and including by the threat of any such action or inaction) for—

- (A) disclosing, being perceived as disclosing, or preparing to disclose (including assisting in disclosing, being perceived as assisting in disclosing, or preparing to assist in disclosing and including a disclosure made in the ordinary course of the duties of the protected individual) to an officer or entity described in paragraph (2) information that the protected individual reasonably believes is evidence of misconduct that violates, obstructs, or undermines any statute, rule, or regulation with respect to any Coronavirus pandemic-related program, project, or activity."

Recent Developments: Criminal Antitrust Anti-Retaliation Act

Congress enacted the **Criminal Antitrust Anti-Retaliation Act** in December 2020.

- The CAARA provides employees and other "covered individuals" with certain protections when they report what they "reasonably believe[] to be a [criminal] violation of[] the antitrust laws" to an appropriate entity (i.e., the government, an internal supervisor, or a company employee with authority to investigate the allegations).
- "Covered individuals" include employees, contractors, subcontractors, and agents.
- Provides protection from discrimination and retaliation from their employers.

Recent Developments: Anti-Money Laundering Act

Congress recently passed the **Anti-Money Laundering Act of 2020** in December.

- The AMLA would establish a whistleblower reward program at the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) modeled on the Dodd-Frank SEC whistleblower program.
- Part of this bill included a private right of action for whistleblowers who suffer retaliation for disclosing potential violations of the **Bank Secrecy Act** ("BSA"), 21 U.S.C. §§ 5311 *et seq.*
- The whistleblower could obtain an award of up to 30% of collected monetary sanctions exceeding $1,000,000.
- The whistleblower reward program that AMLA would establish is similar to the SEC whistleblower program that Congress enacted in the Dodd-Frank Act.
- This includes original information that is outside the knowledge of the Treasury or Justice department.

Recent Developments: Failure to Exhaust Administrative Remedies – *Jaludi v. Citigroup*

Failure to exhaust administrative remedies by missing the statute of limitations.

In *Jaludi v. Citigroup*, 2020 U.S. Dist. LEXIS 226805 (M.D. Pa. Dec. 3, 2020), the district court adopted the Magistrate Judge's report that Plaintiff failed to timely exhaust his administrative remedies and dismissed the case.

Significance: Plaintiffs must not only exhaust administrative remedies, but also must do so within the timeframe required by law.

Standard:

A plaintiff seeking whistleblower protection under SOX must first file an administrative complaint with OSHA **"not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation."** 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. §§ 1980.103(c), (d).

Recent Developments: Failure to Exhaust Administrative Remedies – *Jaludi v. Citigroup*

Court's Ruling:

- Magistrate Judge disagreed with Plaintiff's argument that acts of retaliation were continuous and ongoing, since he had been terminated and continued to apply for and was denied open positions.
- The District Court agreed with the Magistrate Judge's finding that Plaintiff failed to exhaust administrative remedies, even though Plaintiff eventually filed an OSHA complaint.

Recent Developments: Dodd-Frank Pleading Requirements – *Cellucci v. O'Leary*

- **Dodd-Frank Whistleblower Retaliation Claims Require Specific Allegations of the Content of a Complaint**
- In *Cellucci v. O'Leary*, 2020 U.S. Dist. LEXIS 34729 (S.D.N.Y. 2020), the district court granted a motion to dismiss a Dodd-Frank retaliation claim because the plaintiff failed to allege the specific content of his complaint to the SEC or facts from which it could infer that the defendant was aware of such complaint.
- In a retaliation claim, a plaintiff must prove: 1) that he engaged in protected activity; 2) that he suffered an adverse employment action; and 3) that the adverse action was causally connected to the protected activity.
- **Significance:** This case reaffirms that plaintiffs asserting Dodd-Frank claims cannot rely on conclusory allegations of reasonable belief that a defendant's conduct violated the law or that a defendant was aware of an SEC complaint.

Recent Developments: SOX Employment Relationship – *Garvey v. Morgan Stanley*

- **SOX Protection Does Not Apply to Foreign-Based Employees**
- In *Garvey v. Morgan Stanley*, No. 2017-SOX-00030 (Feb. 13, 2020), a Department of Labor Administrative Law Judge ruled that SOX's anti-retaliation provision **does not apply extraterritorially**.
- **Significance:** This case extends prior DOL Administrative Review Board rulings further by ruling that foreign-based employees of a foreign subsidiary of a US company do not qualify for protection under SOX.

Recent Developments: SOX Employment Relationship – *Garvey v. Morgan Stanley*

- The ALJ's Ruling
  - Key factor to consider when deciding whether a claim is a "domestic or extraterritorial application" of SOX's anti-retaliation provision is "the location of the employee's permanent or principal worksite."
  - Other factors, "such as the employee's U.S. citizenship," are "less critical, if not irrelevant" to determining whether SOX's anti-retaliation provision applies.
- Combined with the ARB's rulings from 2019 in *Hu v. PTC, Inc.*, ARB Case No. 2017-0068 (Sept. 18, 2019), and *Perez v. Citigroup, Inc.*, ARB Case No. 2017-0031 (Sept. 30, 2019)—subject to certain exceptions (e.g., claims arising on US military bases abroad or in US territories)—the *Garvey* ruling clearly dismisses the possibility of foreign worker protection under SOX.

Recent Developments: SOX Employment Relationship – *Moody v. American National Insurance Co.*

- **Non-Employees Are Not Protected Under SOX.**
- In *Moody v. American National Insurance Co.*, 466 F. Supp. 3d 727 (S.D. Tex. 2020), a Texas district court dismissed a SOX whistleblower case due to lack of employment relationship.
- **Significance:** Independent contractors and advisory board members of companies are not considered "employees."

Recent Developments: SOX Employment Relationship – *Moody v. American National Insurance Co.*

- Plaintiff failed to provide evidence that he was an **actual employee** of the company or **an employee of a contractor of the employer**.
- The court ruled that directors are not employees even if they have the duties of one.
- The district court distinguished the Supreme Court's decision in *Lawson v. FMR LLC*, 571 U.S. 429, 432, 134 S. Ct. 1158, 188 L. Ed. 2d 158 (2014).
- The court in *Moody* concluded, notwithstanding *Lawson*, "[r]etaliation plaintiffs must be employees of the defendant they sue, whether that defendant-employer is the public company itself or one of its contractors."

Recent Developments: SOX Employment Relationship – *Lozada-Leoni v. Moneygram International*

- **Parent Company May Be Held Liable to Employees of Subsidiaries**
- In *Lozada-Leoni v. Moneygram International*, 2020 U.S. Dist. LEXIS 224068 (E.D. Tx. Oct. 19, 2020), a Magistrate Judge held that a publicly-traded parent company can be held liable to an employee of its subsidiary

Recent Developments: Director Liability in SOX Complaints – *Zornoza v. Terraform Global Inc.*

In *Zornoza v. Terraform Global, Inc.*, 419 F. Supp. 3d 715 (S.D.N.Y. 2019), the district court granted motions to dismiss for failure to state a claim as to certain defendants and denied as to other defendants.

Significance: There is a split of authority whether directors may be held individually liable in addition to the employer companies under SOX.

Recent Developments: Director Liability in SOX Complaints – *Zornoza v. Terraform Global Inc.*

Court's Ruling:

- Analyzing the text of SOX, the court emphasized that a corporation's board of directors is not expressly mentioned.
- The court also considered legislative intent and pointed out that Congress explicitly provided for liability of directors in other provisions, which would have meant that Congress would have expressly called for directors to be liable in the statute if intended.

Compare With: *Wadler v. Bio-Rad Labs., Inc.* (N.D. Cal. 2015), which held that the word "agent" in the statute was ambiguous enough to include directors within that general category.

Recent Developments: What Is Protected Under Section 1514A? – *Erhart v. BofI Holding, Inc.*

In *Erhart v. BofI Holding, Inc.*, 2020 U.S. Dist. LEXIS 57137 (S.D. Cal. Mar. 31, 2020), the district court granted in part and denied in part cross-motions for summary judgment with regards to a SOX retaliation whistleblower claim.

Significance: Not all company misconduct in the security and fraud space is within the scope of Section 1514A.

Recent Developments: What Is Protected Under Section 1514A? – *Erhart v. BofI Holding, Inc.*

Standard: To succeed on a claim, a plaintiff must prove that he reasonably believed that there might have been a violation of a law covered by Section 1514A.

- Plaintiff proposed several rules that BofI allegedly broke that he argued fall under the ambit of Section 1514A: (1) Books-and-Records Rule; (2) Internal Controls Rule; (3) Shareholder Fraud; and (4) Fraud on Regulators.

Court's Ruling:

- The judge tackled each proposed rule individually. Of the four rules allegedly broken, only a violation of the fraud on regulators is not covered by Section 1514A because it does not fall under either the mail fraud, wire fraud, bank fraud, or securities fraud provisions of Section 1514A.

Findings Regarding Each Rule:

- **Books-and-Records Rule**
- **Internal Controls Rule**
- **Shareholder Fraud**
- **Fraud on Regulators**

Recent Developments: Reasonable Belief Standard – *Reilly v. GlaxoSmithKline, LLC*

- In *Reilly v. GlaxoSmithKline*, 820 Fed. Appx. 93 (3d Cir. July 16, 2020), the Third Circuit affirmed summary judgment in favor of the employer for Plaintiff's failure to show that his "belief" that the employer had committed a violation of one of Section 806's enumerated forms was "objectively reasonable."
- **Significance:** A plaintiff's belief, however sincere, that a violation has been committed must be "objectively reasonable."

Recent Developments: Reasonable Belief Standard – *Reilly v. GlaxoSmithKline, LLC*

Court's Ruling:

- The court held that Plaintiff's complaints were not "SOX-protected complaints."
- The court emphasized that "although Reilly is not required to show a reasonable belief that each element of a listed anti-fraud law is satisfied, he must still have an objectively reasonable belief of a violation of one of the listed federal laws."
- Here, there was no violation of any of the six forms of fraud in SOX, but a disagreement about work. Thus, no reasonable person could have objectively believed that the complained about conduct violated SOX.

Recent Developments: Reasonable Belief Standard and Knowledge Requirement – *Wutherich v. Rice Energy Inc.*

- In *Wutherich v. Rice Energy Inc.*, 2020 U.S. Dist. LEXIS 80333 (W.D. Pa. May 5, 2020), report and recommendation adopted, 2020 U.S. Dist. LEXIS 99704 (W.D. Pa. June 8, 2020), the Magistrate Judge granted summary judgment in favor of the Defendant on SOX retaliation claims.
- **Significance:** Believing something is "wrong" rather than "illegal based on federal law" does not satisfy the reasonable belief standard under SOX.

Recent Developments: Reasonable Belief Standard and Knowledge Requirement – *Wutherich v. Rice Energy Inc.*

Plaintiff's Reports and Alleged "Protected Activity"

Court's Ruling on the Reasonable Belief Standard:

- To engage in protected activity, an employee must have "both a **subjective and an objective belief** that the conduct that is the subject of the communication relates to an existing or prospective **violation of one of the federal laws** referenced in [Section 806]."
- The Court further stated, "SOX is not a general anti-retaliation statute." Rather, "[t]he protected activity must 'relate to one of the six specified categories' under Section 806, and 'it does not extend protection to every employee complaint about possible improper or even illegal conduct.' "
- There was no evidence that Plaintiff objectively or subjectively believed that he was reporting a securities violation under Section 806. Providing information related to a violation of Section 806 is not enough.

Recent Developments: Reasonable Belief Standard and Knowledge Requirement – *Wutherich v. Rice Energy Inc.*

Court's Ruling on the Knowledge Requirement:

- With respect to the second element of a *prima facie* case, Plaintiff must show that **Defendant knew or suspected that he engaged in protected activity.**
- Because Plaintiff failed to show reasonable belief of company violations of Section 806, Defendant never knew that Plaintiff's reports were protected activities.
- Plaintiff had merely "insinuated" through body language that the vendor was chosen due to his supervisor's relationship with the vendor. He did not tell anyone that it was a securities violation or that the conflict needed to be disclosed in an SEC filing.
- "Speaking out about something wrong" is not protected activity that would give rise to Defendant's knowledge about a protected activity.

Recent Developments: "Unfavorable Personnel Action" – *Mohan v. UBS Financial Services Inc.*

- In *Mohan v. UBS Financial Services Inc.*, 2020 U.S. Dist. LEXIS 45817 (D. Conn. Mar. 17, 2020), the court dismissed a SOX retaliation claim after finding no "unfavorable personnel action" had been alleged.
- **Significance:** Not all adverse employment actions are considered "unfavorable personnel actions" in relation to SOX retaliation.

Recent Developments: "Unfavorable Personnel Action" – *Mohan v. UBS Financial Services Inc.*

- Plaintiff identified five potential "unfavorable personnel actions":
- The court held that, of the actions identified by Plaintiff, only a threat of termination and constructive termination could potentially constitute an "unfavorable personnel action."
- Under the circumstances, however, Plaintiff failed to plead facts establishing that a threat of termination was made or that he was constructively discharged

Recent Developments: Legitimate Intervening Event – *Barrick v. PNGI Charles Town Gaming, LLC*

- In *Barrick v. PNGI Charles Town Gaming, LLC*, 799 Fed. Appx. 188 (4th Cir. 2020) (per curiam), the Fourth Circuit affirmed the West Virginia District Court's grant of summary judgment that dismissed Plaintiff's SOX retaliation claim.
- **Significance:** Significant and legitimate intervening events that occur between a plaintiff's protected activity and the adverse employment action can defeat a potential retaliation claim.

Recent Developments: Legitimate Intervening Event – *Barrick v. PNGI Charles Town Gaming, LLC*

Court's Ruling:

- The court ruled that Plaintiff failed to demonstrate that the protected activity (reporting of the gambling operation) was a contributing factor to the termination.
- Instead, the main contributing factor was the "legitimate intervening event."

What to Expect from the Biden Administration

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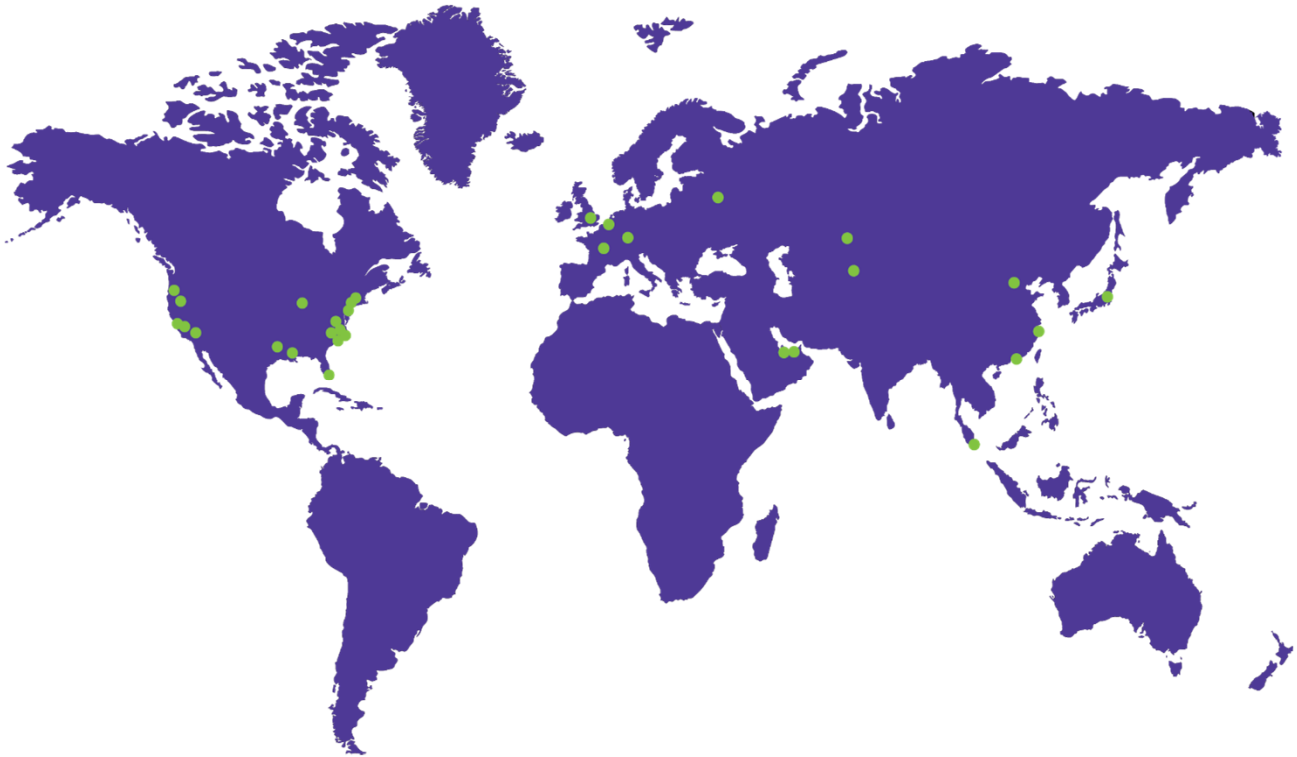

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THANK YOU